SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 83

JAMES P. MITCHELL, SECRETARY OF LABOR, ETC., PETITIONER,

vs.

H. B. ZACHRY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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1 IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

Civil Action No. 1645

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor

vs.

H. B. ZACHRY COMPANY, a corporation

Joint Designation of Contents of Record on Appeal—Filed June 7, 1958

Comes now the parties, pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, and designate the following portions of the record, proceedings and evidence, to be contained in the record on appeal:

(1) Reporter's complete transcript of all the testimony and evidence adduced on October 4, 1957, on the hearing on plaintiff's motion for temporary injunction, together with all exhibits offered in evidence at that time.

(2) Reporter's complete transcript of all the testimony and evidence adduced at the trial of the merits on February 21, 1958, together with all exhibits offered in evidence at that time.

(3) Plaintiff's original complaint filed September 12, 1957.

2 (4) Order to show cause filed September 13, 1957,

(5) Motion for more definite statement filed October 3, 1957.

(6) Defendant's original answer filed October 3, 1957.

(7) Response to show cause order filed October 3, 1957.

(8) Court's memorandum decision filed December 13, 1957.

(9) Order denying preliminary injunction and setting case for trial on merits filed December 13, 1957.

(10) Order entered during first day's hearing before the Court filed February 21, 1958.

(11) Trial amendment to answer filed February 21, 1958.

(12) Memorandum opinion filed March 14, 1958.

(12a) Concise Statement of Points on Which Defendant-Appellant Intends to Rely on Appeal filed the 6 day of June, 1958.

(13) Final decree filed and entered on April 3, 1958.

(14) Joint motion to send up original exhibits in lieu of copies thereof filed on 6th day of June, 1958.

(15) Order of court to send up original exhibits in lieu of copies filed 7th day of June, 1958.

(16) Plaintiff's motion to send up original exhibits offered in evidence on February 21, 1958.

(17) Order of court transmitting original exhibits
3 offered by plaintiff on February 21, 1958.

(18) Notice of appeal filed by defendant May 22, 1958.

(19) Notice of appeal filed by plaintiff May 23, 1958.

(20) This designation.

(21) Bond for Costs on Appeal filed May 22, 1958.

(s) STUART ROTHMAN,
Solicitor,

(s) EARL STREET,

(s) HARRY CAMPBELL, JR.,
Assistant Regional Attorney,

UNITED STATES DEPARTMENT OF LABOR,
Attorneys for Plaintiff.

(s) ALLEN WOOD,

(s) CHESTER JOHNSON,

(s) SIDNEY CALLENDER,

(s) R. DEAN MOORHEAD,
Attorneys for Defendant.

4 [Caption omitted]

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5 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

Civil Action File No. 1645

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor, *Plaintiff*,

v.

H. B. ZACHRY COMPANY, a corporation, *Defendant*.

Complaint—Filed September 12, 1957

I.

Plaintiff brings this action to enjoin defendant from violating the provisions of Section 15(a)(2) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U.S.C., Title 29, Section 201, et seq.), hereinafter called the Act.

II.

Jurisdiction of this action is conferred upon the Court by Section 17 of the Act.

III.

6 Defendant is, and at all times hereinafter mentioned was, a corporation organized under and existing by virtue of the laws of the State of Texas, having its principal office in the city of San Antonio, Bexar County, Texas, with branch offices being set up in various locations from time to time for the supervision of specific projects. It is, now and at all times hereinafter mentioned was, engaged in carrying on certain operations, to-wit, the construction of a dam on the Nueces River, near Mathis, San Patricio County, Texas, under contract with the Lower Nueces River Water Supply District, said District being organized under the laws of the State of Texas.

IV.

At all times hereinafter mentioned defendant employed, and is now employing, approximately 300 employees in the aforesaid construction operations in San Patricio County, Texas. Said employees are now, and have been, engaged in the production of goods for interstate commerce, within the meaning of the Act, in that the said dam and reservoir under construction are designed to and will, improve, enlarge, extend and constitute a reconstruction of the water distribution system of the City of Corpus Christi, Texas, the said system regularly furnishing substantial quantities of water for use in the manufacture of goods to be shipped in interstate commerce.

7

V.

Defendant repeatedly has violated and is violating the provisions of Sections 7 and 15(a)(2) of the Act by employing many of its employees in the production of goods for interstate commerce, as aforesaid, for workweeks longer than 40 hours since on or about December 1, 1955, without compensating said employees for their employment in an excess of 40 hours, in workweeks during said period, at rates not less than one and one-half times the regular rate at which they were employed,

VI.

Defendant has, and is now, violating the aforesaid provision of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

WHEREFORE, cause having been shown, plaintiff prays judgment:

(1) Temporarily enjoining and restraining the defendant, its officers, agents, servants, employees and all persons acting or claiming to act in its behalf and interest, from violating the provisions of Section 15(a)(2) of the Act during the pendency of this action;

(2) Permanently enjoining and restraining the defendant, its officers, agents, servants, employees and all

persons acting or claiming to act in its behalf and interest, from violating the provisions of Section 15(a)(2) of the Act; and,

(3) For such other and further relief as may be necessary and appropriate.

(s) STUART ROTHMAN,
Solicitor,

(s) EARL STREET,
Regional Attorney

(s) HARRY CAMPBELL, JR.,
Assistant Regional Attorney,

UNITED STATES DEPARTMENT OF LABOR,

Post Office Address:
Earl Street, Regional Attorney,
Office of the Solicitor,
U. S. Department of Labor,
Room 217, 1114 Commerce Street,
Dallas 2, Texas,

or

Solicitor,
U. S. Department of Labor,
Washington 25, D. C.

STATE OF TEXAS }
COUNTY OF BEXAR } ss.

Affidavit of L. C. Chandler

L. C. Chandler, of lawful age, being first duly sworn on oath, says:

That he is an investigator of the Wage and Hour and Public Contracts Divisions, United States Department of Labor, and a duly authorized representative of the Administrator of said Divisions, and of the Secretary of Labor. That as such investigator he did, on the 18th day of March, 1957, open an investigation of the operations of

H. B. Zachry Company, Inc., a corporation, carried on near Mathis, San Patricio County, Texas, in connection with the construction of the dam across the Nueces River.

Said dam is being constructed under contract between the said H. B. Zachry Company and the Lower Nueces River Water Supply District, dated sometime in December, 1955, the said project covered by said contract being known as the Wesley E. Seale Dam Project on the Nueces River in Jim Wells and San Patricio Counties, Texas. The said dam is being constructed approximately 1200 feet down stream from the existing dam formerly owned by the City of Corpus Christi, but now owned by the
10 Lower Nueces River Water Supply District, and consists of the construction of an earth filled dam with all necessary spillways, etc., and the removing of the top portion of the existing Lake Corpus Christi Dam.

The said dam is being constructed for the purpose of improving, enlarging, extending and reconstructing the water distribution system owned by the City of Corpus Christi, in that it will materially increase the supply of raw water available to the said water distribution system of the City of Corpus Christi and of outlying communities, for municipal and industrial purposes.

The said water distribution system of the City of Corpus Christi has, and and will in the future, furnish substantial amounts of water, both raw and treated, to industrial concerns located in the City of Corpus Christi, Texas, and the vicinity thereof, for use by such concerns in the manufacture of goods, or use thereof as a part and ingredient of such goods, the requirements of the various concerns running many millions of gallons of water per day. Among such concerns are included Reynolds Aluminum Company, Great Southern Chemical Company, Central Power & Light Company, Columbia Southern Chemical Corporation, American Smelting and Refining Company, Delhi-Taylor Oil Corporation and Corn Products Refining Company. Each of such concerns are engaged in the production of goods for shipment to points without the State of Texas.

11 An examination of the books and records of the said H. B. Zachry Company, a corporation, and particularly of their payroll records, reflect that during the

period subsequent to the beginning of construction of said Wesley E. Seale Dam Project, that employees employed upon said project have been paid overtime compensation, at a rate of one and one-half times their regular rates, for hours worked by them in excess of eight hours per day and for hours worked by them on Sunday. They have not been paid overtime at a rate of not less than one and one-half times their regular rates of pay for hours worked by them in excess of 40 hours in the workweek, excluding the hours in excess of eight in the day or on Sunday. That the failure to compensate said employees for the hours worked by them in excess of 40 in the workweek, excluding hours in excess of eight hours per day and on Sunday, is a violation of Section 7 of the Fair Labor Standards Act of 1938, as amended.

Further affiant saith not.

(s) L. C. CHANDLER.

Subscribed and sworn to before me this 9 day of September, 1957.

(s) H. F. CORDWELL,
Notary Public.

(SEAL)

My Commission expires:
June 1, 1959.

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12 IN UNITED STATES DISTRICT COURT

Order to Show Cause—September 12, 1957—Filed September 13, 1957

Upon consideration of the complaint and affidavit filed herein, and the application of the plaintiff for a temporary injunction, it is,

ORDERED that the defendant show cause on the 4th day of October, 1957, at 9:30 o'clock in the forenoon in the United States District Courtroom, United States Post Office and Courthouse, Corpus Christi, Texas, if any it can, why a preliminary injunction should not issue enjoining and restraining the defendant, its officers, agents, servants, employees and all persons acting or claiming to act in

its behalf and interest, from failing and refusing to comply with the provisions of Section 15(a)(2) of the Fair Labor Standards Act, as amended, and, in particular, from failing and refusing to compensate its employees engaged in the production of goods for interstate commerce, as that term is defined by the Act, in workweeks in which they are employed in excess of 40 hours at rates not less than one and one-half times their regular rates of pay for hours in excess of 40 in such workweeks, in violation of Sections 7 and 15(a)(2) of the Act.

Dated this 12th day of September, 1957.

(s) JAMES V. ALLRED,
United States District Judge

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13 IN UNITED STATES DISTRICT COURT

Response to Show Cause Order—Filed October 3, 1957

Defendant appearing herein in response to Order to Show Cause of this Honorable Court, dated September 1957, respectfully alleges:

I.

While Defendant admits the jurisdiction of the Court, it denies the allegations contained in Paragraph III of the Complaint, and in this connection says that it is a corporation organized and existing under and by virtue of the laws of the State of Delaware, having its principal office in the City of San Antonio, Bexar County, Texas, with branch offices from time to time set up in various locations in connection with specific projects.

II.

Defendant denies the allegations of Paragraph IV of the Complaint, except that it alleges that on the construction operations in question it has employed from time to time since the beginning of such project numbers of employees varying from about 85 to approximately 400, and at the present time there are about 87 employees on said job.

III.

Defendant denies the allegations of Paragraphs
14 V and VI of the Complaint and attaches hereto an affidavit of H. B. Zachry; which is marked Exhibit "A" and referred to for all purposes.

IV.

Further answering; Defendant alleges that to grant a temporary injunction herein would not maintain the status quot but would destroy it, and even though a proper determination of the issues involves questions of fact, to grant the temporary injunction would afford Plaintiff all the relief to which it would be entitled in a hearing on the merits. In the event a temporary injunction herein should be granted, as prayed for by Plaintiff, Defendant would be compelled to make the payments to its employees as provided for by the Fair Labor Standards Act, and if, upon trial on the merits, the position of the Defendant that the job in question is not covered by such Act should be sustained, it would be impractical, if not impossible, for Defendant to recover such payments from any of the employees because many construction workers are itinerant in habits as they go from one construction job to another in different parts of the country. But even if this were not so, as a practical matter to try to obtain a recovery of such payments from an employee who remained in the employ of Defendant would be very difficult and at best would create unfavorable employer-employee relationship. On the
15 other hand, if such temporary injunction were not granted, and upon trial on the merits it should be determined that the operation in question was covered by the provisions of the Fair Labor Standards Act, Defendant represents that it is solvent and responsible and able to make the payments provided for by said Act. Defendant further alleges that the same ultimate questions of fact and of law are involved on a hearing for temporary injunction as are on the merits and that it seems to Defendant to be a time-consuming, unnecessary, and improvident operation to have two similar hearings to determine the same issues.

V.

In addition to the foregoing, Defendant says that from the very general allegations of the Complaint it is unable to ascertain just which employees are claimed to be covered by the Act. On the construction job in question various kinds and classes of employees are engaged, such as executive, administrative, professional, supervisory, and other exempt classifications.

VI.

Defendant points out that the Complaint though it generally and by way of conclusion charges that Defendant violates a statute, to support such conclusion it merely alleges further conclusions that the employees are now and have been engaged in the production of goods for
16 interstate commerce within the meaning of the Act in that the said dam and reservoir under construction are designed to and will improve, enlarge, extend, and constitute a re-construction of the water distribution system of the City of Corpus Christi, Texas, that said system regularly furnishes substantial quantities of water for the use in the manufacture of goods to be shipped in interstate commerce, which pleading does not state any definite facts to support such conclusion and does not supply the requirements even of "Notice Pleading" sufficiently to inform Defendant of facts Plaintiff intends to prove in support of such conclusions and Defendant is unable to ascertain what allegations of fact it will be necessary for it to controvert upon a hearing for the temporary injunction. In other words, the allegations of the Complaint are too vague and general to comply with pleading requirements in an injunction suit and Defendant is not put on sufficient notice to properly prepare its defense.

WHEREFORE, Defendant prays that the application for temporary injunction be denied, that the show cause order be vacated, and for general relief.

(s) ALLEN WOOD
of
FISCHER, WOOD, BURNEY & NESBITT,
1903 Driscoll Building,
Corpus Christi, Texas,

17 (s) CHESTER H. JOHNSON
of
JOHNSON, HITE & CALLENDER,
1109 Transit Tower,
San Antonio, Texas

(s) SIDNEY D. CALLENDER
of
JOHNSON, HITE & CALLENDER,
1109 Transit Tower,
San Antonio, Texas,
Attorneys for Defendant.

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18 **Exhibit "A" to Response to Show Cause Order**

THE STATE OF TEXAS)
COUNTY OF BEXAR) ss.

H. B. ZACHRY, President of H. B. Zachry Company, a corporation, being of lawful age, and being first duly sworn on oath, says:

That the said H. B. Zachry Company by virtue of that certain contract with the Lower Nueces River Water Supply District, a municipal corporation, is constructing a dam on the Nueces River near Mathis, Texas, a river wholly situated within the boundaries of the State of Texas. That said dam is not being constructed for the purpose of improving, enlarging, extending and reconstructing the water distribution system of the City of

Corpus Christi, Texas, and is in fact no part of said system.

That the provisions of said contract between Zachry Company and the District required that employees be paid at the rate of one and one-half times their regular rates for hours worked by them in excess of eight hours per day and for hours worked on Sunday and Zachry Company has fully complied with said provisions.

That by virtue of the requirements of Article 5159a, Vernon's Annotated Civil Statutes of the State of Texas, the District was required to, and did, ascertain the general prevailing rate of per diem wages—in the locality in which the dam was to be constructed—for each craft
19 or type of workman or mechanic needed to execute the contract. That the prevailing rates as determined by the District were specified in the call for bids and in the contract itself and Zachry Company has paid to its said employees affected by same not less than the specified rates as determined by the District.

The dam being constructed for the District by Zachry Company is purely local in nature and the work of the employees building the dam has neither a close nor an immediate tie with the process of production of goods for commerce and hence H. B. Zachry Company is not in violation of the provisions or requirements of the Fair Labor Standards Acts, as amended.

Further affiant saith not.

(s) H. B. ZACHRY
H. B. Zachry

Subscribed and sworn to before me by the said H. B. ZACHRY this the 1st day of October, 1957.

(s) GRACE C. ORSBORNE,
(SEAL) Notary Public in and for
Bexar County, Texas

GRACE C. ORSBORNE,
Notary Public, Bexar County Texas.

20 IN UNITED STATES DISTRICT COURT

**Defendant's Motion for More Definite Statement—
Filed October 3, 1957**

Plaintiff has alleged in Paragraph V of his Complaint that "Defendant repeatedly has violated and is violating * * * provisions of the Act by employing many of its employees in the production of goods for interstate commerce, * * * for work weeks longer than 40 hours since on or about December 1, 1955, without compensating said employees for their employment in an excess of 40 hours, * * * at rates not less than one and one-half times the regular rate at which they were employed."

Defendant moves the Court for an Order directing Plaintiff to file a more definite statement or a bill of particulars of the following matters:

1. The name or names of Defendant employees claimed to have been underpaid.

2. What periods of time said employees were underpaid.

3. The interstate character of the work performed by said employees referred to in 1 and 2 above.

The ground of the motion is that the above matters are not averred with sufficient definiteness or particularity to enable Defendant properly to prepare its answer in that

21 Defendant does not know whether or not Plaintiff is claiming that all, or a part, of its alleged 300 employees were underpaid from "on or about December 1, 1955", therefore, Defendant does not known nor can it ascertain, during what particularly work-weeks of this 21 month period the said employees allegedly worked in excess of said 40 hour workweek. Furthermore, because of the fact that the nature of the employer's business is not determinative but the application of the Act depends upon the character of the employees' activities, Defendant cannot properly and truthfully prepare its answer without the information sought in 3 above.

WHEREFORE, Defendant prays that said motion be granted.

(s) ALLEN WOOD

of

FISCHER, WOOD, BURNEY & NESBITT,
1903 Driscoll Building,
Corpus Christi, Texas,

(s) CHESTER H. JOHNSON,

of

JOHNSON, HITE & CALLENDER,
1109 Transit Tower,
San Antonio, Texas,

(s) SIDNEY D. CALLENDER,

of

JOHNSON, HITE & CALLENDER,
1109 Transit Tower,
San Antonio, Texas,
Attorneys for Defendant.

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22 IN UNITED STATES DISTRICT COURT

Answer—Filed October 3, 1957

I.

Jurisdiction of the Court is admitted, but Defendant alleges that the Complaint does not allege a cause of action upon which the prayer for relief can be granted.

II.

Defendant admits the allegations of Paragraph III of the Complaint except states that it is a corporation organized and existing under and by virtue of the laws of the State of Delaware.

III.

Defendant denies the allegations contained in Paragraph IV of the Complaint, except that it alleges that it has em-

ployees engaged in the construction work involved numbering from time to time, depending on conditions, from approximately 85 to 400, and that there are now employed approximately 87 on such job.

IV.

Defendant denies the allegations contained in Paragraph V of the Complaint.

V.

Defendant denies the allegations contained in
23 Paragraph VI of the Complaint.

WHEREFORE, Defendant prays that this action be dismissed and in the alternative that Plaintiff take nothing herein and that this Defendant go hence with its cost without day, and for general relief.

(s) ALLEN WOOD,

of

FISCHER, WOOD, BURNEY & NESBITT,
1903 Driscoll Building,
Corpus Christi, Texas,

(s) CHESTER H. JOHNSON,

of

JOHNSON, HITE & CALLENDER,
1109 Transit Tower,
San Antonio, Texas,

(s) SIDNEY D. CALLENDER,

of

JOHNSON, HITE & CALLENDER,
1109 Transit Tower,
San Antonio, Texas,
Attorneys for Defendant.

24 IN UNITED STATES DISTRICT COURT

Reporter's Transcript of Testimony

Appearances:

Counsel for Plaintiff:

MR. HARRY CAMPBELL, JR., Assistant Regional Attorney, Office of the Solicitor, U. S. Department of Labor, Room 218, 1114 Commerce Street, Dallas 2, Texas.

MR. EARL STREET, Regional Attorney, Office of the Solicitor, U. S. Department of Labor, Room 217, 1114 Commerce Street, Dallas 2, Texas.

Counsel for Defendant:

Messrs. Johnson, Hite & Callender, 1109 Transit Tower, San Antonio, Texas, by MR. SIDNEY D. CALLENDER and CHESTER H. JOHNSON.

Messrs. Fischer, Wood, Burney & Nesbitt, 1903 Driscoll Building, Corpus Christi, Texas, by MR. ALLEN WOOD.

BE IT REMEMBERED, that upon the trial of the above styled cause, begun on the 4th day of October, A. D. 1957, before His Honor, James V. Allred, Judge of said Court, the following proceedings were had:

25 **Colloquy Between Court and Counsel**

The Court: Be seated, Gentlemen. Good morning.

The Clerk: Civil Action Number 1645, James P. Mitchell, Secretary of Labor, versus H. B. Zachry Company.

The Court: This is a hearing on a show cause order why a temporary injunction should not be issued, restraining the defendants from violating the provisions of the Fair Labor Standards Act. Will you note your appearances, Gentlemen, in the case? Mr. Campbell, what are the initials?

Mr. Campbell: Harry Campbell, Jr. and Mr. Earl Street for the plaintiff.

The Court: And your address, please?

Mr. Campbell: 1114 Commerce Street, Dallas, Texas.

The Court: Mr. Allen Wood.

Mr. Wood: Corpus Christi, Texas, and Mr. Chester Johnson, Transit Tower, San Antonio, Texas, and Mr. Sidney Callender, Transit Tower, San Antonio, Texas, for the defendant.

Your Honor, might I present Mr. Callender to the Court? He is not admitted here.

The Court: Well, that is all right, he can serve in this case. Now, Gentlemen, I have looked over the pleadings in the case, and a little more in detail, examined
26 the complaint, and I want to ask Counsel for the Government what—I don't get the exact distinction here. The affidavit of Mr. Chandler, second and third paragraph, it says—correction, the last paragraph, that an examination of the records and so forth show, "that employees employed upon such project have been paid over time compensation, at a rate of one and one half times their regular rates, for hours worked by them in excess of eight hours per day and for hours worked by them on Sunday. They have not been paid over time at a rate of not less than one and one half times their regular rates of pay for hours worked by them in excess of forty hours in the work week, excluding the hours in excess of eight in the day or on Sunday."

Mr. Campbell: The situation is this, Your Honor. Let's assume that a man works six ten-hour days, he would be paid two hours over time each of those days for the hours in excess of eight, but he wouldn't be paid over time for the first eight hours on the sixth day. In other words, the over time involved here is that which occurred during the first eight hours on Saturday where the man had worked at least forty straight time hours earlier in the week. I was looking at the payrolls a minute ago, and they specifi-
27 cally show, as the evidence will show, that they were paid forty eight hours straight time when they worked six or more days in the week, and then over time after—

The Court: Above the forty eight?

Mr. Campbell: Yes, sir, that was the effect of it.

The Court: Well, I notice the defendant's reply here is that he was paying them at the prevailing—had to determine the prevailing wage rates under a Texas statute, and had been doing that. What I am trying to get at, what

is the difference between your investigator and Mr. Zachry on this matter, aside from the question of whether or not it is commerce?

Mr. Campbell: I don't think there is any difference. They did pay the prevailing rate as required by Texas statute. As long as that rate was more than a dollar an hour, we have no quarrel with them. They did not pay over time after forty hours, in the work week. They paid over time, actually, after forty eight hours in the work week. Now, that—

The Court: Well, in other words, what do they work, eight hours a day or ten hours a day? You gave me a situation while ago. Suppose they work ten hours a day?

28 If they work ten hours a day, four days would be forty hours.

Mr. Campbell: And they would get eight hours over time because of the hours in excess of eight in a day, but the payrolls will reflect, Your Honor, that where a man worked six days of eight hours or more per day, he was paid forty eight hours at straight time rate. Now, where he worked on Sunday, he got time and a half for that, and that is offset against the over time under the statute. We have no quarrel there. Where he was paid over time after eight hours a day, that also is to be offset against over time under the statute, and we have no quarrel there. Our differences come as to the eight hours work on the sixth day for which straight time was paid, and the payrolls will reflect they do it consistently, that this was the practice followed, they paid them forty eight hours straight time.

The Court: Is that a uniform practice now, from the books?

Mr. Campbell: Yes, sir.

The Court: Is that all employees, or what?

Mr. Campbell: Well, it is all of the construction employees, and those are the ones that we are looking to here.

29 The Court: You are not claiming that as to employees in general? In his motion for a bill of particulars, he wants to know what employees you are talking about.

Mr. Campbell: We are talking about the construction employees. Now, there were a number of employees who

were paid properly in the office, some of the others, we have no quarrel with what he did with them. Our difference arises from the construction employees and the method in which they were compensated.

The Court: All right, then, he seriously disputes the question of whether or not he is in commerce.

Mr. Campbell: Yes, sir, or there is this, this is an integral part, his work is an—put it this way, the reservoir is an integral part of the system of the City of Corpus Christi for the supply and distribution of water. That system is furnishing water to concerns engaged in production of goods for interstate commerce, and the Courts have held, including the Fifth Circuit, that utilities furnish power, fuel and water to concerns engaged in producing goods for interstate commerce are themselves producing goods for interstate commerce. Employees—and the Courts have held this, the Eighth Circuit and Fifth Circuit have held, in regard to the extension and improvement of water systems, employees improving, enlarging, extending reconstructing the water system are themselves engaged in production of goods for interstate commerce, as that term—

The Court: Employees of independent contractors?

Mr. Campbell: Yes, sir.

The Court: And doing it for the agency?

Mr. Campbell: Yes, sir.

The Court: For the utility—in this instance, the state agency?

Mr. Campbell: Yes.

The Court: Well, I am not familiar with those decisions. I don't care to get into them now, I am trying to find out what the points of difference between you are, and whether or not this motion for a bill of particulars should be granted. If they know what employees you are talking about, and it is all of a certain class, I don't see any reason to particularize it, offhand. I will hear from them in a moment. I am impressed with the argument to issue a temporary injunction and dispose of the case on its merits.

Mr. Campbell: We are prepared to go to trial on the merits.

The Court: Well, they are not. I imagine—people usually want about twenty days on that, anyway, and they haven't had it.

31 Mr. Campbell: Here is the problem as we see it, Your Honor. If we are right on our theory of the coverage angle on this, they have been underpaying a substantial number of employees for a period of twenty one months. That is in excess of seventy-thousand dollars that the employees—

The Court: That is a good, solvent company?

Mr. Campbell: Yes, sir.

The Court: I know these workers want the money if they can get it, especially when the job plays out.

Mr. Campbell: Now they say in their response that they wanted to preserve the status quo. In other words, they want to preserve the status quo by continuing to violate the Federal statute.

The Court: I will let you argue it in a minute, I just want to try to get the difference between you, and I will hear from them. I believe I will let them, in view of the statement you have made—I want to see if we can't get down to—eliminate this question of the bill of particulars, which ordinarily might be good, but if it is all of a certain class, and if it is a question of whether they are in commerce, I don't see any necessity, offhand, for a bill of particulars. I would be glad to hear from you gentlemen now, in view of the clarifying statement, if it is clarifying,

32 that Counsel has made.

Mr. Wood: Your Honor, we don't have much to add to what we wrote in our response to appear and show cause. We thought that what we said in that motion was correct, and the usual procedure, and that the purpose of a temporary injunction, normally, certainly is to preserve the status quo, rather than to change it as a temporary injunction would do here; and we also thought that a temporary injunction had for a purpose, not the disposition of the case on the merits, as a ruling adverse to Zachry Construction Company would have here. The only difference between that judgment and the final judgment would be that the one was interlocutory and the other was final. They would resolve exactly the

the same ultimate issues of fact and law, and we don't think—I understand, of course, that the Court can go ahead and hear these matters anyway, but we think the practice and purpose of this sort of a hearing is not to do either one of those things, not to change the status quo on the one hand and not to resolve the controversy on the merits, actually on the other. Now, as we point out in here, Your Honor, and as the Court noted, the Zachry Company, we think, is a solvent company, and if it turns out in the final analysis that this money should be paid these employees, why they will have their
33 rights against him. On the other hand, as we say—of course, this is pleading, it is not proof, but I think everybody knows that these workers are itinerant, they follow construction jobs from time to time, and if a payment is made to them under order of a temporary injunction and it turns out on the merits that that was improperly granted, there is no way for the contractor to get it back, or really even try to get it back, and I understand he would make no effort to. In the first place, he couldn't run people down, wherever they happened to be. In the second place, if some old, faithful employee who spent the money, it would be very bad employee-employer relations to go say, "I have overpaid you a little bit, let me have it back;" and a ruling against us at this stage of the game on those ultimate issues that would be on the merits would put us in that position, and we can't see that it would prejudice the Department of Labor, really, to try the thing on the merits. Now, this is argument, pure and simple, but from the affidavit that Your Honor referred to there, it develops that Mr. Chandler investigated this matter in March of this year, and evidently he must have had enough uncertainty about it—of course I don't know what the situation was, but he investigated it in
34 March and didn't file this lawsuit until September, and of course, they knew the job was progressing, and now it is practically completed, as I understand it, maybe 98 per cent completed. So we think it would be a useless and unnecessary proceeding to have a full-scale hearing here on a temporary injunction that would later have to have another trial on the same issues, identical same issues on the merits, that it is not necessary and not a

good expenditure to the parties' time, the Court's time or anybody else's time. Now, of course, we contend, and I am not, Your Honor, a labor lawyer or expert in the field at all, but we contend basically on the facts that this is a local project, that this dam that is being constructed is new construction, that it is not in the sense of the statutory language as they say here in the pleading, that it will improve, enlarge, extend and constitute a reconstruction of the water distribution system. They don't say "supply system," they say "distribution system," and we don't think that is true in the first instance, and in the second place, our contention is that even th ugh the water does come from the reservoir that will be created here down the stream of the river into the filtration plant at Calallen and later into the mains and lines, and goes to people who make things for interstate commerce, that the operation is too remote anyway to put our people in commerce or the production of goods for commerce. That, of course, is on the merits, and I want to call the Court's attention to one of those things that streses what I am trying to say, and that is what Judge Frankfurter said in one of these cases. He said that trying to interpret this law and apply it to a given fact situation was—no, I will back up. Here is what he said, he said that to try to lay down a general principle or controlling principles that are applicable to the application of this law is as rewarding—this is his langauge, now, "is as rewarding as an attempt to square a circle;" that every fact situation stands on its own basis, that it is controlled, and the law applied to it on the basis of the exact detail fact situation existing there. So I just merely mentioned that to ill strate and emphasize the fact that really this preliminary thing would be, in effect, a final disposition of the case so far as we are concerned.

The Court: Well, Judge, in view of the fact that the administrator has—someone for the administrator has said that they are talking about the construction employees as a class, not other groups of employees, now is there a necessity for a bill of particulars now as to the employees? You know who he is talking about, it is all of your construction employees, I guess. The

information, I would think, would be peculiarly within your knowledge. In other words, it is just a general principle they are contending for, and you are contending to the contrary, and the amounts and so forth would be a matter for later action.

Mr. Wood: Mr. Callender says that if that is their position, that it is all of the construction workers, that's sufficient to satisfy the requirements that we asked for.

The Court: All right. Now, I would hesitate—I will be frank with Counsel, I would hesitate to issue a temporary injunction. It would have to be a pretty strong case, of course it should be, wherein the case is going to have to be tried on its merits. Of course, if we go to trial on the temporary injunction and try it out—usually it is tried out fairly thoroughly on temporary injunction, and it would really dispose of it on its merits anyway.

Mr. Wood: Well, Your Honor, we are not ready to announce on the merits yet, though we have no disposition to delay it unduly, I will put it that way.

The Court: I suppose the main thing to hear evidence on at this time would be the nature of this project,
37 try to determine whether or not the work is in commerce; and offhand, I haven't read any of these cases that he is talking about, and that you may have in mind. Offhand, of course, the average lawyer, I should think, and the average judge would regard construction work on a dam as being of a local nature; but some decisions, and there have been a few, we think are clearly local, have gotten into commerce under some decisions. I suppose that what I should hear, then, is evidence as to the nature of the project and as to the reason for why I should issue a temporary injunction, which does, in effect, dispose of the case on its merits. I had intended to call attention earlier to the fact that the investigator made the investigation—that has been going on since 1955. The investigator made the investigation in March of 1957, and here in September I am asked to issue a temporary injunction. How much longer is the project going?

Mr. Wood: Your Honor, I believe, under the contract with the City, Mr. Zachry has until December 31st of this year to complete the construction. I might say this, Your

Honor, in the event an injunction is issued, why, we will want to try it on its merits later.

The Court: All right,—

38 Mr. Wood: Of course, what I am thinking about is, if it is granted.

The Court: I might—you know judges have announced they were going to issue a temporary injunction, then stay it. That has been done, so it can be passed on on appeal. So I imagine when we have a hearing, it is going to dispose of it on the merits.

Mr. Wood: Your Honor, my thought is that we should have one hearing, because it does involve the same ultimate issue.

The Court: That is always the judge's thought too. That is what I am getting at.

Mr. Wood: Our thought is that we should have the hearing on the merits at a time when we can be prepared and ready for it, and that will dispense with the hearing now. But, if we can't, why, we can't, of course. That was our thought.

The Court: Well, since the plaintiff is here and the burden is on them, I will hear the evidence that they have, then consider further delay, if it is necessary. I may be able to hear enough evidence to determine, preliminarily, whether or not, from the facts, or get some facts in the light of which I can read these cases and see whether or not it is commerce. All right, it will not be neces-

39 sary at this time to put on any evidence about the rates of pay and who they have not paid and so on, in view of the fact that the defendants are familiar with what you are contending. There is no real dispute except the construction to be placed on it in view of the state statute and Federal statute, all of it depending on whether or not they engaged in producing goods for commerce.

Mr. Wood: Your Honor, do you prefer we all sit over there wh re we can talk to the witnesses, or—

The Court: Just whatever you all want to do is all right. Yes, you will be a little closer. All right, let all the witnesses you want sworn be sworn.

(Whereupon all witnesses present in the Courtroom were sworn.)

Victor Jaeggli.

having been first duly sworn on oath, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Please state your name and address. A.
40 Victor Jaeggli, Corpus Christi, Texas.

Q. By whom are you employed, Mr. Jaeggli? A. Lower Nueces River Water Supply District.

Q. And what is your position? A. General Manager.

Q. Do you have custody of the records?

The Court: What is the title of that, Lower Nueces what?

A. Lower Nueces River Water Supply District.

Q. As General Manager, do you have custody of the records of the district? A. Yes, I do.

Q. I will ask you, Mr. Jaeggli, if you have brought with you, in response to a subpoena duces tecum, a copy of the contract between the district and the City of Corpus Christi? A. Yes, sir, I do have.

Q. And did you bring with you a copy of the design and bond issue preliminary report? A. Yes, sir.

Q. And a copy of the bond election order? A. Yes.

Q. And a copy of the prospectus furnished purchasers of the bonds? A. Yes, sir.

41 (Whereupon Plaintiff's Exhibits Nos. 1, 2, 3 and 4 were marked for identification.)

Q. Mr. Jaeggli, how long have you been associated with the water district? A. Approximately five and a half years.

Q. Has that been substantially since it was organized? A. No, I came with the district in May of 1952, and the district was created by the Legislature in 1949.

Q. When was the first bond election held? A. The first bond election was for a series of water wells held prior to the time I joined the district, in 1950 or 1951. The bond order that you have is for the initial issue of fifteen million five for the construction of the dam itself.

Q. Yes, sir. Handing you what has been marked as Plaintiff's Exhibit No. 1, will you please state what that

is? A. It is a water contract between the Lower Nueces River Water Supply District and the City of Corpus Christi.

Q. Handing you Plaintiff's Exhibit No. 2, will you state what that is, please, sir? A. It is a summary report
42 on the preliminary design and bond issue estimate, as prepared by the consulting engineers, for the district.

Q. And Plaintiff's Exhibit No. 3? A. The bond election order passed on the 6th day of November, 1952, calling for an election on $15,500,000.00 in bonds.

Q. And Plaintiff's Exhibit No. 4? A. This is—you described this as a prospectus a minute ago; it is a preliminary circular on six million five hundred thousand dollars in bonds sold by the Lower Nueces River Water Supply District in January of this year.

Q. Is that the only circular, the only such circular that was issued to prospective purchasers? A. We have never issued any ourselves as a district. I think possibly the First National Bank has issued a larger prospectus, but I do not have a copy of it.

Q. That is the only circular the district issued? A. That's right.

Mr. Campbell: We offer in evidence, if the Court please, Plaintiff's Exhibits 1 through 4.

Mr. Wood: Your Honor, we have no objection to No. 1, that is the water contract between the City and the
43 district. Now, the engineering report, No. 2, of course that is hearsay, and it may be admissible for some purposes, but we object to it, if it is offered for showing the truth of matters asserted in it, as being hearsay.

The Court: All right, I will carry the objection along with the case.

Mr. Wood: And the bond election order, we have no objection to that. The prospectus, put out by somebody, of course, we object to that as being hearsay if it is offered for the truth of legal matters asserted in it.

Mr. Campbell: Well, Plaintiff's Exhibit No. 4, Your Honor, he says is the only circular put by the district.

The Court: I will carry the objections along with the case.

Mr. Wood: You didn't say that that circular was put out by the district, did you?

The Witness: No, sir, it was not put out by the district.

Mr. Campbell: Exhibit No. 4 was not put out—

The Witness: Was not put out by the district.

44 The Court: He said it was the only prospectus, on bonds issued by the district, of what it meant, but if wasn't put out by the district.

Q. Now, Mr. Jaeggli, do you have a picture showing the dam site of the Wesley E. Seale Dam? A. Yes, sir.

(Whereupon Plaintiff's Exhibit No. 5 was marked for identification.)

Q. Handing you what has been marked as Plaintiff's Exhibit No. 5, I will ask you to state what that is. A. An area photograph, taken on May 2, 1957, showing the new Wesley Seale Dam under construction, and also showing the old dam upstream from it.

Q. Is the old dam on your right as you look at the picture? A. Yes, it is.

Q. Is that a fair representation of the relationship between the two structures? A. It is.

Q. You are familiar with the site? A. Yes.

Mr. Campbell: We offer Plaintiff's Exhibit No. 5, Your Honor.

45 Mr. Callender: We have no objection.

The Court: All right.

Q. Now, Mr. Jaeggli, are you familiar with the specifications of the new reservoir that will be backed up by the Wesley E. Seale Dam? A. Yes.

Q. What will be the capacity of that reservoir? A. Slightly over 300,000 acre feet.

Q. Do you know what the capacity of the former Lake Corpus Christi was?

The Court: How many acre feet?

The Witness: Three hundred thousand. A. The present reservoir has a capacity of approximately 34,000 acre feet.

Q. So it will be an increase of approximately ten times in capacity? A. That's correct.

Q. Is that water to be used for any purpose other than furnishing water to the Corpus Christi Water Department? A. Our contract with the City of Corpus Christi

provides that all of the water that is impounded by the Wesley E. Seale Dam will be sold to the City of Corpus Christi.

Q. What will be done with the old dam when the
46 new one is completed? A. It will be inundated by the new lake.

Q. Will it be breached? A. A portion of the embankment on the old dam will be lowered. I think that is to the extent which we do any work on the old dam.

Q. How far downstream is the new dam from the old one? A. Varying from about thirteen hundred feet to fifteen hundred.

Q. Do you know how near completion the dam is? A. Approximately 95 per cent complete.

Q. Can you tell the Court what remains to be done to complete it? A. Certain concrete work downstream from the south spillway, addition of fill work of approximately, I would say, a hundred and sixty thousand cubic yards.

Q. I understand also that the riprap is to be placed on the face of the embankment? A. Substantially all of the riprap has been placed. There is a little additional riprap to be placed.

Mr. Campbell: That's all. You may cross examine.

47 Cross Examination

By Mr. Callender:

Q. Mr. Jaeggli, have you told us that you work for the water district? A. That's correct.

Q. Are you paid wholly by the district, your pay, your salary? A. Correct.

Q. Are you familiar with how the district was created? A. Yes, sir, I am.

Q. Will you tell us about that? A. The district was created by a special act of the Legislature in 1949 as a water control and improvement district, operating under the general law of 7880.

Q. Does that law set out the powers that the district, or the things that the district can do, set out specifically what you can do? A. It does.

Q. Does it set the boundaries of your district? A. It does.

Q. The land is encompassed by the district?

The Court: There is a little lawsuit over the boundaries.

48 Q. Is all that land situated in the district within the State of Texas? A. It is.

Q. Is the district itself in any way related to the City of Corpus Christi, or are they both separate entities? A. They are separate governmental agencies.

Q. Is the district a municipal corporation, is that the designation? A. Yes, it is.

Q. Are you familiar, Mr. Jaeggli, with the distance that the new dam, by river miles, how far is that away from the treatment plant at Calallen? Do you know in river miles? A. By river miles, approximately 26, I believe, in river miles.

Q. And how far—26 river miles from the treatment plant at Calallen to the dam? A. Right.

Q. Do you know how far it is from Calallen, where the treatment plant is, to the city limits of Corpus Christi? A. Some 16 miles. The treatment plant is not in the City of Corpus Christi,—

49 Q. At Calallen. A. —it is at Calallen.

Q. Now, Mr. Jaeggli, in order for the district to have operating capital, you told us, I believe, that they issue bonds, is that correct? A. That's correct.

Q. Now, prior to the time that you issued these bonds, did you have an election? A. We did.

Q. And who voted in regard to this election? A. The qualified tax-paying voters within the boundaries of the district.

Q. Just those situated within the boundaries of the district, is that correct? A. That's correct.

Q. You submitted that proposition to the local voters and they voted on it, is that correct? A. That's correct.

Q. Now, after the bonds were approved, you sold some of the bonds, is that correct? A. That's correct.

Q. Now, how, Mr. Jaeggli, will those bonds be paid off? A. First, the bonds are unlimited tax bonds.

The Court: How much bonds did you sell?

A. We sold fifteen million five for the construc-

50 tion of the dam. Those bonds are unlimited tax bonds. However, we plan to retire them with com-

bination tax and revenues from the sale of water. We are now levying a tax of 20 cents per hundred dollars valuation.

Q. You mean the tax would be levied on the local inhabitants situated within the district? A. That's correct.

Q. And from this tax, you will get revenue with which to retire the bonds? A. Well, I haven't quite made myself clear. We have two sources of revenue, one from the tax, the other from the sale of water to the City of Corpus Christi, or rather, it is not exactly the sale of water, because we impound the water for the City of Corpus Christi.

Q. In other words, what I am getting at, there is no outside capital coming from any other place other than the residents of this district? A. That's correct.

Q. Do you know, as a matter of fact, whether or not the new dam is in any way connected with the old dam? A. No, it is not.

51 Q. It is not? A. No.

Q. Do you know, Mr. Jaeggli, the population of the City of Corpus Christi? A. Approximately 165,000.

Q. Now, can you tell us, please, sir, the population, if you know, of the inhabitants within the confines of the district? A. Approximately 200,000.

Q. Do you know, of your own knowledge, whether the Nueces River is wholly situated within the boundaries of the State of Texas? A. Yes, it is.

Q. It is. And the water shed, which furnishes water for the lake, that too is situated wholly within the state, is it not, the State of Texas? A. It is, yes, sir.

Mr. Callender: That's all. Thank you, sir.

Redirect Examination

By Mr. Campbell:

52 Q. Mr. Jaeggli, when you say the new dam is not connected with the old, you mean physically attached to the old, is that right? A. That's correct.

Q. Why was the new dam located where it was? A. Our construction engineers reported that this particular site was one of the most economical sites on the Nueces River for the construction of the dam.

Q. Was consideration given to raising the heights of the old dam? A. Not by our present engineers. I understand that it happened before I came to the district, but I can't testify on that myself.

Q. Now, aside from the financial and legal details of organization of the district, what was the purpose of the construction of the Wesley E. Seale Dam; what was it intended to do? A. To provide a dependable water supply for Corpus Christi and vicinity. I mean by that, the general Coastal Bend area.

Q. In other words, it was necessary to increase the amount of water available to the City as it grew? A. Yes, it was.

Mr. Campbell: That's all.

53 Mr. Wood: May I just ask him one question, Your Honor?

The Court: Yes.

Further Cross Examination

By Mr. Wood:

Q. Mr. Jaeggli, did the fact that the old dam is located where it is have anything to do with the decision to locate the new dam where it is? A. No, I don't believe so, other than reflecting that that particular site was a natural site, that area was a natural site for the dam. That is the only thing.

The Court: Do you mean by the fact that the old dam was located where it was, it was so evident, of course, that this general area was the proper site for the new dam?

A. That's correct.

The Court: That is the reason the old dam was put there in the first place, it just wasn't big enough as it turned out, and you needed some more water?

A. That's right.

54 Q. But the mere fact that the old dam happened to be there, that fact in and of itself had nothing to do with the decision to put the new dam where it is? A. None whatsoever.

Mr. Wood: That's all.

The Court: All right, you may be excused.

Mr. Campbell: Your Honor, I would like to excuse these witnesses that testified. They are all busy men and have given their time—

The Court: All right, I have just said he may be excused.

Owen S. West.

having been first duly sworn on oath, testified as follows:

Direct Examination

By Mr. Campbell:

Q. State your name and address, please, sir. A. Owen S. West, City of Corpus Christi.

Q. By whom are you employed, Mr. West?
55 A. By the City of Corpus Christi.

Q. In what position? A. Utilities Office Manager for the Public Utilities Department.

Q. As Office Manager of that department, do you have custody of the records of the City Water Department? A. Part of them, yes, sir.

Q. In response to a subpoena duces tecum, have you brought with you certain summaries of sales by the City Water Department, covering the period since about December, 1955? A. Yes, sir.

Q. Will you produce those, please?

(Whereupon Plaintiff's Exhibit No. 6 was marked for identification.)

Q. Mr. West, handing you what has been marked for identification as Plaintiff's Exhibit No. 6, I will ask you to state if those are the full, true and correct copies of records, official records of the City Water Department? A. Yes, sir, they are.

Q. And what do those records reflect? What do they cover? A. These records cover the monthly sta-
56 tistics on the number of customers and consumptions and revenue broken down into residential, commercial, seasonal, hospitals, schools, churches, city and industrial inside and outside the city limits.

Q. And it covers the period from the month of December, 1955, through the month of August, 1957, is that correct? A. Yes, sir.

Mr. Campbell: We offer Plaintiff's Exhibit No. 6 in evidence.

Mr. Callender: We have no objection.

Q. How long have you been with the Public Utilities Department, Mr. West? A. Since July of 1955.

Q. Have you been familiar with the customers of the Department during that period? I don't mean to say that you know all of the details, but you know generally who they sell to? A. Yes, sir.

Q. Do they sell to railroads here? A. Railroads, yes, sir.

Q. Do they sell to the telephone company? A. Yes, sir.

Q. Western Union? A. Yes, sir.

57 Q. Do you furnish water to the airport? A. Yes, sir.

Q. Do you have any truck companies that purchase water from you, that you know of? A. That is transportation companies?

Q. Yes, sir. A. Yes, sir.

Q. Do you know the purpose of the construction of the Wesley E. Seale Dam? A. Yes, sir.

Q. What is that purpose?

The Court: Well, I think that it is admitted that the dam is to get adequate water supply, not only for Corpus Christi, but for the whole area.

Mr. Wood: May I make one observation? The allegations are, in Paragraph 4, that these people are working on a project which will enlarge, improve, extend and constitute a reconstruction of the Corpus Christi Water Distribution System. Now, our thought is just this, that, of course, the facts are admissible, whatever they are, but in this particular case, it may be, and we lean to the opinion that those things constitute conclusions, to

58 ask a witness, "Does that enlarge it, or does that constitute a reconstruction of it?" Ordinarily, it wouldn't be, but right here, inasmuch as that possibly is one of the ultimate issues that bears on it, that that would be a conclusion; and we think it is all right to ask him what the purpose was, perhaps, if he knows. Of course, Mr. Jaeggli has answered it already once.

The Court: Well, that is the advertised purpose, and we voted for it, to get an adequate water supply for this

area, for our yards, our homes, our industries and other people that needed it, not only in the town, but in this area here; and frankly, we wanted a real bigger dam, but, if I recall right, the Governor, at that time, said that we were planning too big a dam and it would furnish more water than this Gulf Coast area could ever think about using, and we didn't get that, and this dam was a substitute. That is my recollection about it. It reminds me of back in 1918 when they built Lake Worth at Fort Worth. The opposition there said it would furnish more water than they could ever use in the foreseeable future, and I believe they are still fighting for more water up there, although I believe they built two or three more lakes. All right.

Q. Mr. West, does the Water Department have any source of water besides the Lake Corpus Christi? A. Yes, sir, they do.

Q. What is that, wells? A. Yes, sir.

Q. What percentage, if you know, of the total water is produced in those wells? A. I can't say exactly, I don't believe, right now.

Q. Can you give us an estimate from your knowledge of the Water Department operations? A. I would be afraid to say without looking at the records.

Q. Would it be an appreciable percentage after this Wesley Seale Dam is completed? A. After the new dam is completed?

The Court: Uh huh.

A. It will not be used at all, it will be a stand-by.

Mr. Campbell: You may cross examine.

Cross Examination

By Mr. Callender:

Q. Mr. West, you said you sold water to railroads. You do not know what they use the water for? A. No, sir.

Q. You sell them drinking water, of course? A. Certainly.

Q. The telephone company buys water with which to drink, don't they? A. I don't know what they use it for.

Q. These transportation trucks, what about those? A. The trucks or companies?

Q. Yes. A. Well, I don't know what they use it for. I imagine for drinking water, or whatever else they use it for.

Q. And you don't know where they go with it, do you? A. No, I don't.

Mr. Callender: That's all. Thank you, sir.

Mr. Campbell: Thank you, Mr. West.

61 **John E. Paspahala.**

having been first duly sworn on oath, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name and address? A. John E. Paspahala, Great Southern Chemicals.

The Court: How do you spell that last name?

A. P-a-s-p-a-h-a-l-a.

Q. You live here in Corpus Christi? A. Yes, sir.

Q. What is your position with the Great Southern Chemical Company? A. My title is Assistant Comptroller.

Q. Are you familiar with the operations of that concern? A. I am, sir.

Q. What does it produce? A. Well, our major products are aromatics.

Q. Would that be benzene, toluene and xylene? A. Benzene, toluene and xylene, yes, sir.

Q. Where does the company sell its products? A. Well, we sell our products all over.

62 Q. Both inside and outside—

The Court: There is no dispute that that company sells its products in interstate commerce?

Mr. Callender: No, sir.

The Court: And practically all the major industries in this area. Isn't that conceded, Gentlemen?

Mr. Callender: Yes, sir.

Mr. Campbell: Thank you, sir.

Q. You purchase water from the City of Corpus Christi? A. We do, yes, sir.

Q. What are your normal monthly requirements, on the average? A. I would estimate around 20,000,000 gallons a month.

Q. And how is that water used by the company, outside of for drinking and sanitary purposes? A. Well, sir, I can

give you a layman's opinion on how it is used, but a process engineer would be more appropriate to ask that question.

Q. Let me phrase it this way. Mr. Paspahala, you have seen the plant? A. I have, sir.

Q. Do they have steam boilers there for the pro-
63 duction of power? A. Yes, sir.

Q. And water is used in those boilers? A. Yes, sir.

Q. Do they have cooling towers and condensation towers? A. Yes, sir.

Q. Is water used in connection with those?

The Court: I don't think the details of how the water is used—I think it is common knowledge that these industries use various quantities of water for the very purposes you are outlining.

Mr. Campbell: Well, it is a necessary part of our record, Your Honor. While we are offering this testimony now, we have a number of additional witnesses we took depositions of in connection with another proceeding. I would be very happy to shorten this and offer the depositions.

The Court: Well, I don't see any reason for cluttering up the record here. There is no dispute that these industries use a large quantity of water, is there?

Mr. Wood: Judge, I think that is absolutely correct. The only thing is what they do with the water, what
64 use they do make of it, whether the water is a part of the product that they sell, or whether it is just used—

The Court: It is not part of the product, it is used for cooling towers and engines and so forth.

Mr. Wood: So far as I know, none of them are part of the product, but—

The Court: So far as I know, none of them are. Do you know of any that water is a part of their product?

A. No, sir.

The Court: Any appreciable part of the product?

A. No, sir.

Mr. Campbell: I am sure they try to keep it out of their petroleum products.

Mr. Wood: Your Honor, further than that, we don't know of any industries who sell water outside of the state, the water itself.

Mr. Campbell: We don't contend that.

The Court: Well, I don't think there is any dispute about the general picture, it is a question of whether or not you get back up here and these dam workers on the Wesley Seale Dam are covered by this act.

65 Mr. Campbell: Well, I would like it understood, Your Honor, that the additional witnesses I have will testify substantially the same as this gentleman has.

The Court: Well, that is admitted, and it is admitted that—you have got the number of industries in this area, I am sure, covered by this breakdown here, and it is admitted they use a substantial amount of water in connection with their production of goods, a substantial portion of which move in commerce.

Mr. Campbell: That's all. Thank you.

Mr. Wood: Your Honor, the defendant will stipulate to that for this hearing, of course.

The Court: Yes.

Mr. Campbell: I would like to excuse, then, Your Honor, all these witnesses who were subpoenaed to testify along those lines.

The Court: All right.

Mr. Callender: May I ask the witness one question?

The Court: All right.

66 Cross Examination

By Mr. Callender:

Q. You said you buy water from the City of Corpus Christi, is that right? A. Yes, sir.

Q. You do not buy any water from the Lower Nueces River Supply District, do you? A. No, sir.

Q. You have no contract with them at all? A. No, sir.

L. C. Chandler,

having been first duly sworn on oath, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name and address, please? A. L. C. Chandler, San Antonio, Texas.

Q. Are you employed by the Wage and Hour Public Contracts Division of the United States Department
67 of Labor? A. I am.

Q. What is your title, please? A. Investigator.

Q. Did you make an investigation of the construction work being carried on by H. B. Zachry Company near Mathis, Texas? A. I did.

Q. About what time did you open that investigation? A. Some time around March of this year.

Q. Did you do—when did you finally complete your work on that investigation? A. It took about two weeks, I believe, in other words to complete my work on that.

Q. Then didn't you return to do some additional work? A. Yes, sir.

Q. At the conclusion of the first part of your investigation, did you hold a conversation with any representatives of the H. B. Zachry Company? A. I did.

Q. What representatives did you confer with? A. I first talked to Mr. Cavazos, and he later called in Mr. Johnson, their attorney.

The Court: Who is Mr. Cavazos? What is his title?
68 A. Secretary and Treasurer, I believe.

Q. Did you advise Mr. Cavazos of your findings? A. I did.

Q. Did you ask him to come in compliance with reference to the construction workers on the—

The Court: What did you tell him you found? Haven't you got something about that? Do you have a summary of what your findings were? Did you just tell him verbally? A. I told him that they were not paying time and a half after forty hours. In other words, they were paying time and a half after eight hours in a day, time and a half for their Sunday work, but the Saturday work was paid at straight time, even though the employees had previously worked forty hours up until the Saturday work.

Q. Did you advise him it was the position of the Department of Labor that the work was subject to the Fair Labor Standards Act? A. I did.

Q. What did he have to say? A. Well, he called in Mr. Johnson. In other words, he said he couldn't answer, he called in Mr. Johnson.

Q. Then you later conferred with Mr. Johnson
69 and Mr. Cavazos? A. That's right.

Q. What was their answer to your request that they come in compliance? A. They weren't going to comply with the law.

Mr. Campbell: That's all.

Cross Examination

By Mr. Callender:

Q. Now, Mr. Chandler, did you say they told you they were not going to comply with the law? A. That's right.

Q. They didn't tell you that in their opinion they were not covered by the law? A. That was their position, yes.

Q. That they were not covered, isn't that right? A. That's right.

Q. And not just an outright statement, "We are not going to comply with the law," they didn't say that, did they? A. That's right.

Q. All right. Now, as a matter of fact, Mr. Chandler, of your own knowledge, do you know, as a matter of
70 fact, that this reservoir up there is a part of the distribution system for water in the City of Corpus Christi? Do you know that of your own knowledge? A. Not of my own knowledge.

Q. Not of your own knowledge, do you? A. No.

Mr. Callender: That's all. Thank you, sir.

The Court: Wait a minute.

Mr. Campbell: That's all. Mr. Johnson, I request the production of the contract between the Lower Nueces River Water Supply District and the defendant here.

(Whereupon Plaintiff's Exhibit No. 7 was marked for identification.)

Mr. Campbell: Your Honor, before examining this witness, I want to offer in evidence the contract between the Lower Nueces River Water Supply District and H. B. Zachry Company as Plaintiff's Exhibit No. 7, and I am sure the defendant will wish to withdraw and submit copies, and we, of course, have no objection.

The Court: All right.

71 **Amado Cavazos,**

having been first duly sworn on oath, testified as follows:

Direct Examination

By Mr. Campbell:

Q. State your name and address, please, sir. A. Amado Cavazos, 302 Windale, San Antonio, Texas.

Q. You are employed by H. B. Zachry Company, Mr. Cavazos? A. Yes, sir.

Q. What is your position? A. Treasurer.

The Court: What?

A. Treasurer.

Q. Are you familiar with the compensation practices being carried on in connection with the construction of the Wesley E. Seale Dam near Mathis, Texas? A. Yes, sir.

Q. What are those practices as being carried on now? A. The payment of the rates as specified in the contract.

Q. How about over time? A. The contract

72 specifies over time after eight and on Saturday.

Q. Eight hours a day? A. I am sorry, on Sundays.

Q. But you are not paying over time on the first eight hours on Saturday, is that correct? A. That's correct.

The Court: They work eight hours a day?

A. Sometimes they work more than eight hours a day, Your Honor.

The Court: Well, as a regular thing, it is eight hours a day, six days a week, is that it?

A. Some of them work ten hours a day, six days a week.

Q. You still are not paying over time after forty hours of work week? A. Not as such.

Mr. Campbell: That's all. You may cross examine.

The Court: There is no dispute about that.

73 Cross Examination

By Mr. Callender:

Q. Mr. Cavazos, is it true that these workers who work on such jobs as this are itinerant in nature and move from job to job?

Mr. Campbell: I object to that, Your Honor, as wholly immaterial?

The Court: Overrule.

Q. Is that a fact, that they are itinerant and move from job to job? A. Am I supposed to answer it?

The Court: Yes, sir.

A. A large majority, yes.

Q. And do they move from state to state? A. Well, I would just presume that some of them do, the people who follow construction in general.

Q. Now if the temporary injunction is granted, and when—

The Court: I think I can answer that better than he can, Counsel.

Mr. Callender: I was going to ask him, Your Honor, if he would try to get the money back in the event, on the merits, the Court determined coverage.

74 The Court: Well, all right. I beg your pardon.

Q. In the event that the company pays the employees over time, and it is eventually determined by the Court that the act is not applicable, would you attempt to recover that money back? A. The decision wouldn't be up to me personally, it would be up to probably Mr. Zachry or the Board, but I don't think so.

Q. In your opinion, would it create a distasteful employer-employee relationship? A. I cannot imagine that the company would do such a thing.

Mr. Callender: Thank you, sir.

The Court: All right.

Plaintiffs Rest

Mr. Campbell: The plaintiffs rest, Your Honor.

Mr. Wood: May we have just a moment, Judge?

The Court: All right, we will just take a fifteen minute recess, if you like.

(Whereupon a short recess was taken, after which the following proceedings were had.)

75 The Court: Anything further from the defendant?

Defendant Rests

Mr. Callender: Your Honor, the defendant rests also.

Colloquy Between Court and Counsel

The Court: All right. Counsel, when can you have a brief ready on this?

Mr. Campbell: I have a brief ready right now, Your Honor.

The Court: All right, deliver copies to Counsel, and you gentlemen, how long do you want to reply?

Mr. Callender: May we have a week or ten days, Judge?

The Court: You can have a couple of weeks. Then, I will give the Government one week to reply. Will that be sufficient?

Mr. Campbell: Yes, sir.

The Court: And the case will be submitted three weeks from today. That will be—we will put it three weeks from Monday. That will be the 28th. Monday is the 7th. I will be gone the week of the 21st, anyway. I will be in Laredo and I don't have a library there, so it will be submitted October 28th on motion for preliminary injunction.

76 Mr. Campbell: Your Honor, I would like to call the Court's attention to one case I did not cite in the brief, and that is Tobin versus Raney, 205, Federal Second, 606, Fifth Circuit Decision.

The Court: All right, just note that on the cover there, Mr. Clerk. I want you gentlemen to consider, now, the possibility of submitting it on its merits also. It might be that you want to submit it on the merits. I don't see much more that can be developed. All right. Thank you, Gentlemen. Court will stand recessed pursuant to the rule.

77 (Reporter's Certificate to foregoing transcript omitted in printing.)

78 IN UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

**Court's Memorandum Decision—December 10, 1957—
Filed December 12, 1957**

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FOR PLAINTIFF.

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Corpus Christi, Texas,

CHESTER JOHNSON
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SIDNEY D. CALLENDER
1109 Transit Tower
San Antonio, Texas,

FOR DEFENDANT.

Action by the Department of Labor against defendant, a Texas corporation, for preliminary injunction to restrain violation of Sec. 15(a)(2) of the Fair Labor Standards Act (U.S.C., Title 29, Section 201 et seq.), by failure to pay time and one half to its construction employees for all work in excess of 40 hours per week. Evidence was presented before the court on October 4, 1957 on an order to show cause why preliminary injunction should not issue as prayed.

79 Defendant is engaged in the construction of the new Wesley E. Seale dam, thus creating a new reservoir, on the Nueces River near Mathis, San Patricio County, Texas. This work is being done under contract with the lower Nueces River Water Supply District, a

conservation and reclamation district, created by special act of the Texas Legislature, Art. 8280—134 Vernon's Texas Civil Statutes, the validity and powers of the District having been upheld by the Texas courts.[1]

The material facts are not in dispute. Defendant pays its employees time and a half for all hours in excess of eight each day and for all hours worked on Sunday but not in excess of 40 hours per week.[2] Plaintiff contends that defendant's employees are engaged in commerce "in that the said dam and reservoir . . . are designed to and will improve, enlarge, extend and constitute a reconstruction of the water district system of the city of Corpus Christi, the said system regularly furnishing substantial quantities of water for use in the manufacture of goods to be shipped in interstate commerce." Defendant
80 contends that its employees are not so engaged in the production of goods for commerce within the meaning of the act because:

(1) Defendant is building the dam under contract, not with the City of Corpus Christi, but with the District, created as a separate and independent state agency by the legislature under the Conservation Amendment to the Texas Constitution, sec. 59, Article 16;

(2) The dam being built and the reservoir created thereby, will belong to the District, not the city, the water being sold under contract by the District to the city, after it is released by the District at the dam and comes 26 miles down the Nueces River before it arrives at the city's treatment plant at Calallen, Texas; thereafter it is distributed by the city, in its own and separate distribution system, to its customers, domestic and industrial.

(3) In any event, defendant's construction workers are not covered by the act.

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[1] Lower Nueces River Water Supply Dist. v. Cartwright (Tex. Civ. App.), 274 SW(2) 199, error ref. n.r.e.

[2] For instance if employees work 10 hours per day for six days, (including Saturdays), a total of 60 hours, defendant only pays them for 12 hours overtime.

The contracts between defendant and the District on the one hand and the City of Corpus Christi and the District on the other have been introduced in evidence. While
81 defendant is an independent contractor, contracting with the District, a separate and distinct political entity from the city, consideration of both contracts and the complete picture presented by the evidence clearly discloses that the purpose of the new dam was to provide a tremendously enlarged reservoir, which will inundate the existing dam and reservoir and furnish an adequate water supply for the city.[3] The new dam is being built 1300 to 1500 feet down stream from the old. A substantial amount of the water furnished and to be furnished by the city is to industries producing goods which move in interstate commerce. It largely is used in the productive process but, in some instances, it becomes an ingredient of the goods produced and subsequently moving in commerce.

It is settled that employees of concerns regularly supplying goods essential to the functioning of interstate instrumentalities and interstate producers are within the act, such as concerns manufacturing or producing materials for construction of interstate highways.[4] In Mitchell v.
82 Vollmer, 349 U.S. 427, the court held not only that repair of the facilities of interstate commerce was within the act but improving existing facilities as well. There employees engaged in the construction of an alternate lock and canal to form a part of the Gulf Intercoastal Waterway were engaged in commerce and covered by the Fair Labor Standards Act. The court, liberally construing the act, also held that the question of commerce and coverage must be determined by practical considerations, not technical conceptions; and that the test is whether the work is directly and vitally related to the functioning of an instrumentality or facility of interstate

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[3] The boundaries of the district are not co-extensive with the city's. The contract bound the city to furnish water to any resident of the district.

[4] Allstate Construction Co. v. Durkin, 345 U.S. 13; Thomas v. Hempt Bros., 345 U.S. 19; Tobin v. Johnson, 8 Cir., 198 F(2) 130; Emulsified Asphalt Products Co. v. Mitchell, 6 Cir., 222 F(2) 913.

commerce as to be, in practical effect, a part of it rather than isolated, local activity.[5]

It is true that the contract between defendant and the District is one step removed from the reported cases, that is here defendant's contract is with the District which will sell water to the city and the city, in turn, will sell to users engaged in commerce; but the evidence here, especially the contract between the District and the City, I think brings defendant's activities within the test set
83 out in Vollmer, supra. It clearly shows that the new dam was the most practicable means of enlarging the existing water reservoir so as to enable the city to secure a much needed and more abundant source of water supply; that the city owns a Water Permit (No. 933) issued by the State Board of Engineers for 500,000 acre feet from the Nueces River for domestic, municipal, manufacturing, etc., purposes, and that the full benefit of such permit could not be realized by the present impounding facilities; that the parties have agreed that the city shall thereafter operate and maintain the dam and impounding facilities, and that an ad interim supplementary water supply agreement is to be superseded by the new agreement. I think, therefore, that defendant's construction activities for the district, while providing a new and larger dam and reservoir, actually supersedes, incorporates and makes use of the existing dam and reservoir so that by all practical considerations, as distinguished by technical conceptions, it is at once an improvement, a rebuilding and a new construction. Therefore its work is so directly and vitally related to furnishing water which the city in turn will furnish to water users producing goods in commerce as to be in practical effect an unbroken chain in, and part of, such commerce rather than an isolated, local activity.

84 Defendant objects to the issuance of a preliminary injunction on the ground that necessity therefor has not been shown, at least until the case is tried upon its merits. I do not see what additional evidence can be

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[5] See also Tobin v. Ramey, 5 Cir., 205 F(2) 606; Mitchell v. Chambers Const. Co., 10 Cir., 214 F(2) 515; Durkin v. J. B. McCray Co., 5 Cir., 206 F(a) 277; Archer v. Brown & Root, Inc., 5 Cir., 241 F(2) 663.

brought forward upon the merits but defendant is fully able to respond to any judgment and there is no pressing need for a preliminary injunction. I would prefer that the case be fully developed. I shall, therefore, treat the foregoing as declaratory, and will set the case for trial upon the merits at Corpus Christi, January 17th, at which additional evdience may be taken if necessary.

The clerk will notify counsel.

(s) JAMES V. ALLRED,
Judge

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85 IN UNITED STATES DISTRICT COURT

Reporter's Transcript of Proceedings

Appearances:

COUNSEL FOR PLAINTIFF:

Mr. Harry Campbell, Jr., Assistant Regional Attorney, Office of the Solicitor, U. S. Department of Labor, Room 218, 1114 Commerce St., Dallas 2, Texas.

COUNSEL FOR DEFENDANT:

Messrs. Johnson, Hite & Callender, 1109 Transit Tower, San Antonio, Texas, by Mr. Sidney D. Callender and Chester H. Johnson.

Messrs. Fischer, Wood, Burney & Nesbitt, 1903 Driscoll Bldg., Corpus Christi, Texas, by Mr. Allen Wood.

Mr. Dean Moorehead, Box 858, Brown Bldg., Austin, Texas.

BE IT REMEMBERED, that upon the trial of the above styled cause, begun on the 21st day of February, A. D. 1958, before His Honor, James V. Allred, Judge of said Court, the following proceedings were had:

86 **Colloquy Between Court and Counsel**

The Court: All right, be seated. Now gentlemen, heretofore I have had a hearing on the petition for preliminary injunction, and heard evidence in October of last year,

filing a memorandum, in which I held that, in my opinion, on the evidence before me, the defendant was in violation of the Fair Labor Standards Act; and in which I stated I didn't see what additional evidence could be brought forward upon the merits, but I would prefer that the matter be fully developed, and would treat the memorandum I entered at that time as declaratory, and set the case for trial upon its merits here at Corpus Christi. I am wondering if it is going to be necessary to hear all this evidence all over again.

Mr. Campbell: No, sir, the parties have agreed, Your Honor, that the record of the proceeding in October may be considered at this time, and I have very little additional evidence, primarily addressed to the Court's discretion.

The Court: Does the defendant have any further evidence to offer?

87 Mr. Wood: We suggest that we just let that constitute the record on the merits, without the introduction of additional evidence, but as Mr. Campbell has said, they want to introduce some additional evidence. In that event, we will need to introduce some additional evidence, but as to just how much it will be depends upon what the plaintiff introduces.

The Court: I wish we could just try it on the record that has been made. I don't see what else could be offered. I have another matter that went over from yesterday afternoon, and I told the parties to be back here at 10:00 o'clock this morning, so I can hear evidence for 30 minutes, I guess.

Mr. Campbell: I think I can complete it in that time.

The Court: The trouble is, you open something up, and it is always just one or two questions, Judge, just going to ask one or two questions, and usually it is two hours or half a day.

Mr. Moorehead: We have made the flat offer, which has been outstanding for several weeks, just to in-

88 troduce the record that was made back in October and rest on that, and if it is opened up by the Government in the way that we anticipate they will do, I think the better part of the day will be required.

The Court: What do you want to offer evidence on, Counsel?

Mr. Campbell: At this time, I will want to offer the interrogatories, served on the defendant in October, and the answers. I will want to offer a transcript of a proceeding in the District Court of New Mexico against the same defendant.

The Court: The transcript of the whole proceedings, or—

Mr. Campbell: A transcript of the complaint, answer and certain interrogatories. It is all certified. I would also want to call Mr. Cavazos for a very brief examination.

The Court: Well, I will hear you for 30 minutes, then I am going to recess this thing over until I get through with the other case.

Offers in Evidence and Objections Thereto

Mr. Campbell: The plaintiff, at this time, Your Honor, will offer the interrogatories and the answers and
89 the transcript.

Mr. Wood: Your Honor, we object, of course, to the admission of this testimony for the purpose of proving the truth of the allegations. In other words, here is the complaint, for example, and it wouldn't be admissible for the purpose of proving the truth of the statements made in the complaint, and we would certainly want it limited to—

The Court: What is it about there? Is that about some lawsuit, you say, in New Mexico?

Mr. Campbell: Yes, sir, that is—

The Court: You mentioned it on the other trial in the summation, as I recall, something about a lawsuit out there, but we didn't have any evidence about it.

Mr. Campbell: No, sir, it is simply the evidence as to the additional dealings between the secretary and the defendant here, which I think is of material importance.

The Court: Well, was it on a similar project?

Mr. Campbell: It was on an airfield. It is not offered as proof that the Mathis Dam project was covered,
90 no, sir. All I am offering at this time is evidence for the proper exercise of this Court's discretion

as to wether a permanent injunction should issue, and the form of that injunction, which I think is all material. The dealings between the defendant and the Department over the years, that is all covered by the interrogatories, his past dealings.

The Court: All right, I will hear it, I guess. I don't like to try another lawsuit.

Mr. Campbell: I don't think that is it. This is merely to show there has been previous litigation between the Department and the defendant.

Mr. Wood: Now, Your Honor, we also object to the affidavits attached to the complaint if they are offered for the purpose of proving the proof of the matters asserted. They would be hearsay.

The Court: They will certainly not be admitted for that purpose.

Mr. Wood: Also the interrogatories and the answers to them, which, as I understand the rule, are for the
91 purpose of that case only. We would make the same objection as to them. Now we think, then, the offer should be limited solely to the proposition of showing what occurred, what the pleadings were and what the proceedings were. Now, Your Honor, not only that, but with reference to these interrogatories and the questions, we make the further objection that the pleadings in this case do not support the offer, and there is no pleading to justify it. What I am referring to there, Your Honor, is paragraph five in the complaint in this case, in which the pleading is that the defendant has violated, and is violating, the Fair Labor Standards Act by failing to comply with it on the Mathis Dam project. There is no pleading at all that he had ever violated the act at any time prior to that, and this is what that apparently seeks to prove. So he hasn't pleaded any prior violations, and we object to it, because there is no pleading to support proof of this sort of thing. To illustrate that, Your Honor, in this petition that he now offers, to show how it differs from the petition before us in this Court paragraph
92 five says—this is the case in New Mexico—"Defendant repeatedly has violated, and is violating, the provisions of Section 715-A of the act, by employing many

of its employees in Interstate Commerce, within the meaning of the act as aforesaid, for a work week longer than 40 hours since February of 1941." He pleaded over there, in other words, prior violations. There are no pleadings whatever in this case of prior violations, and nothing to lead us to suspect that we would be called upon to meet evidence of this character.

The Court: When was the judgment rendered in this case in New Mexico?

Mr. Johnson: January 14, 1955.

The Court: Well, that is pretty remote, and I can see, certainly in a lay mind, and to some extent a legal mind, considerable difference in the activities complained of in connection with construction of an air field and the construction of this dam up here, certainly more room for argument about it.

Mr. Campbell: As I say, Your Honor, this is offered merely as proof that there has been previous litiga-
93 tion, part of the overall history of the dealings between the Department and the defendant.

The Court: There is no claim that he ever violated a New Mexico injunction, is there?

Mr. Campbell: No, sir, the New Mexico injunction was limited to the one project.

Mr. Wood: Your Honor, may I make one further objection, and that is this, that the judgment, the certified copy of the judgment, finds that he was in good faith, the defendant was in good faith in his operations of the job involved there in New Mexico. It does enjoin him from violating the act with reference to that one job; it does not enjoin him, by a general blanket injunction, from ever violating the act at any time in the future. And we take the further objection that those prior contentions and proceedings back in 1941 to the date of this judgment were either litigated by the Government in that case, or could have been under their pleadings, and a final judgment was rendered, refusing to grant the Government a blanket injunction as
94 prayed for, and therefore, these former relationships and contentions and activities were settled adversely to the Government with that decree, which has certainly an implied finding that whatever they were, they

weren't sufficient to justify the granting of a blanket injunction by the Court, and all that past history, whatever it may have been, is res judicata. Now it's true that we don't have a plea here, but if the Court admits it, why, then we would like to file a trial amendment setting up that plea.

The Court: Well, I think your objection and my observation goes more to the weight to be accorded this than it does to the admissibility of it. I will admit it in evidence, and I may strike it out later on, not attach a great deal of importance to it. I don't know.

(Whereupon Government's Exhibit No. 1 was marked for identification.)

Mr. Wood: Note our exception.

The Court: All right.

95 Mr. Campbell: May I call Mr. Cavazos now?

The Court: All right.

Amado Cavazos.

having been first duly sworn on oath, testified as follows:

Direct Examination.

By Mr. Campbell:

Q. State your name and address, please, sir. A. Adamo Cavazos, 302 Windale, San Antonio, Texas.

Q. You are an officer of the H. B. Zachry Company, are you not? A. Yes, sir.

Q. And how long have you been an officer of that company? A. Since some time in 1936.

Q. Are you familiar with the project at Mathis, on the Mathis Dam? A. Yes, sir.

Q. When was that job completed, if it has been completed? A. Well, it is substantially completed, it is ninety nine point something completed. We consider it

96 practically—the original contract practically finished.

Q. Do you have men still working on that project? A. Yes, sir, there are a few men.

Q. Are they compensated for their weekly overtime at this time? A. On the basis as called for in the contract.

Q. They are still not paying them overtime, except under the contract? A. That's right.

Q. So that you are still not paying them overtime on Saturday? A. You mean as such, if they work on Saturday?

Q. Where it is in excess of 40 hours. A. No, sir, not necessarily.

Q. It is not necessary? A. I say, "They are not necessarily being paid if they work in excess of 40, if they had worked the first part of the week more than eight hours every day, it would be in excess of 40.

The Court: In other words, they haven't changed the system since I had the preliminary hearing here?

A. No, sir.

The Court: Same system?

97 A. Yes, sir.

The Court: How many employees do you have left now?

A. I imagine about 40 or 50. There was a small change-over, and we are doing some additional work.

The Court: What type of employees, and what kind of work are they doing?

A. Well, cleaning up, and I believe there is still some sodding and drilling.

Q. Have you had any supplemental contracts on that project? A. It is called a change order.

Q. Have you had any since October? A. Yes, sir.

Q. What were they? A. This change order that calls for some drilling work, I believe it was issued in January of 1931.

Q. What kind of drilling, Mr. Cavazos? A. I am not an engineer, but I understand it is drilling though the concrete for the purpose of obtaining certain type of drainage.

The Court: I saw something in the paper about the drilling, some wells below the dam.

A. I don't know whether you call it wells, but it is

98 some kind of drainage holes to keep the pressure off, or something.

The Court: Yes, I read something about it in the paper.

Q. Are you doing any land clearing in the basin for the dam? A. I don't believe so. I am not that intimately acquainted with the details of the work.

Mr. Campbell: You may cross examine.

Mr. Wood: We have no questions, Your Honor, at this time.

Mr. Campbell: The plaintiff rests, Your Honor.

Mr. Wood: Your Honor, we want to make a motion at this time.

The Court: All right.

Mr. Wood: And I will just dictate it, if I may, to the Reporter.

The Court: All right.

Defendant's Motion to Dismiss

Mr. Wood: This motion to dismiss this action is grounded on the premise that all of the construction workers of the defendant on the Wesley Seale Dam are performing activities closely related, or directed to the production of
99 goods for commerce, thus covered by the provisions of the Fair Labor Standards Act. The record before the Court will not sustain the proposition. While we do not plead such to be the case, it is possible that such records would have sustained the proposition prior to the amendment of Section 203-J in 1949. By this amendment, it is made clear that Congress did not intend to cover employees by the act whose activities are so remote from Interstate activities as those on Mathis Dam. This is evidenced by the House conferee report, 81st Congress, First Section, 1949. As is shown by six or seven examples given in this report, the activity of the employees involved here are at most remotely related, or indirectly essential to the production of goods for commerce, and are therefore not covered by the act. In support of this motion, see Mitchell versus Jaffie, 156 Federal Supplement, Mitchell versus Lublin, 250 Federal Second, 253, Mitchell versus Moore, 241 Federal Second, 249. Wherefore, the defendant prays that the action be dismissed. Your Honor, we won't argue that particularly, unless you would
100 like to have us argue it.

Colloquy Between Court and Counsel

The Court: Well, I am not familiar with those cases.

Mr. Wood: What we had in mind was, we have got some additional authorities since we briefed this before, and

we wanted to have the opportunity to submit you an additional brief on the matter.

The Court: All right, I would be very happy to—

Mr. Wood: Now, Your Honor, we have two witnesses that we had in mind using. In view of the turn things have taken, why,—the Government has rested at this point. I don't know whether we want to go forward any further or not. We would like to have a chance to confer about it.

The Court: Well, we will take a recess and you can confer. Suppose we recess until, say, five minutes of 10:00, and come back at that time, and if you want to present evidence, I will have to set it over until this afternoon, anyway.

Mr. Wood: It is understood, of course, that this
101 former transcript is a part of the record?

The Court: Yes, sir. We will recess until five minutes of 10:00. That clock, I believe, is slow. What do you have?

Mr. Campbell: It is about five minutes slow, Your Honor.

The Court: We will recess ten minutes. That ought to give you time to confer, gentlemen.

(Whereupon a short recess was taken, after which the following proceedings were had.)

The Court: All right, gentlemen, be seated.

Mr. Wood: Your Honor, we wish to put on two witnesses, and we believe they can be put on and finished with in about 30 minutes.

The Court: Well, I know how that goes. You are thinking about from your standpoint, but on cross examination,—

Mr. Wood: That might be something else.

The Court: Well, I tell you what I will do, I will recess this particular hearing over until 2:00 o'clock, and
102 you gentlemen can pass in a list of those authorities. If you have a brief on that question I raised a while ago, I would like to read those cases before I finally dispose of this case. I did have this case set here this morning, but I also had the one yesterday, and the weather prevented me from getting back from Laredo night before last; so I didn't start on that matter until 2:00 o'clock

yesterday afternoon. There is quite an assemblage of folks here in that case, so I will just have to put this over until 2:00 o'clock, if there is any further evidence.

Mr. Wood: Thank you, Your Honor.

The Court: All right.

(Whereupon Court recessed until 2:00 p.m., February 21, 1958, after which the following proceedings were had.)

The Court: All right, Mitchell versus Zachry, we will go forward, Gentlemen. I hope your estimate of thirty minutes is good. I have given you just a little more time than that, not much.

Mr. Wood: Thank you, Judge. We want to offer
103 a trial amendment in connection with the res judicata plea we mentioned to you this morning, and Mr. Campbell has a copy of it.

The Court: All right.

Mr. Wood: Now then, Your Honor, for the limited purpose, and I want to say that we don't waive our objections to the admissibility of the evidence in the New Mexico proceedings that we heretofore made, and subject to those objections, and for the limited purpose of showing what was before the Court in that action, why, we ourselves offer the proceedings, the certified copy that the plaintiff offered that are already in evidence; and we also wish to offer, for the same limited purpose, a certified copy of some stipulations that we made in that case.

(Whereupon Defendant's Exhibit No. 1 was marked for identification.)

Mr. Wood: We offer this in evidence, Defendant's Exhibit 1.

Mr. Campbell: I have no objection, Your Honor.

The Court: What is that? Anybody offered that
104 big thing there?

Mr. Campbell: No, sir, I think that is in the reorganization proceeding.

The Court: All right, I was going to say that I don't believe I'm going to open up anything like that.

Mr. Wood: Now, Your Honor, there are on file here, and they haven't been offered in evidence, but they are

on file in the proceeding a request for admissions, filed by the plaintiff.

The Court: In this instant case?

Mr. Wood: In the instant case, and those requests for admissions have been answered by the defendant. In connection with our objection to the evidence concerning prior alleged, or claimed violations, and our objection as to those proceedings over in New Mexico, and all that, we wish to move to strike those requests for admissions and the answers to those requests for admissions, with the exception of two alleged, or claimed violations that are listed in the requests and in the answers that occurred after the New Mexico suit. I haven't got before me just

105 exactly which two those are, but I believe I can—

these really are written interrogatories, Your Honor, instead of requests for admissions, and the ones that relate to date after the New Mexico proceedings are numbers VI and V, V and VI; and in view of the fact that these interrogatories and the answers have not actually been offered in evidence, I would like to ask Mr. Campbell, if I may, if he regarded them as before the Court.

Mr. Campbell: I offered those in evidence this morning, Your Honor, the interrogatories and the answers.

The Court: In the instant case?

Mr. Campbell: Yes, sir.

Motion to Strike and Ruling Thereon

Mr. Wood: Well, I didn't catch that, so we move to strike those on the grounds we have heretofore objected to the New Mexico proceeding, and all prior alleged violations.

The Court: Well, now, Counsel, Mr. Campbell, you say that you are offering this New Mexico record for the purpose of assisting me in the exercise of my discretion. How will it help me here in this case? That is

106 an entirely different state of facts, entirely different kind of an undertaking, and three years old. How will it help me to exercise my discretion in this case?

Mr. Campbell: On the grounds, Your Honor, that that is not either a first investigation of this defendant by the Department, nor the first litigation that has been had

between this defendant and the Department. In other words, what I am offering the interrogatories and the New Mexico proceedings for is simply to show the Court that this is not a new matter, but a long, continuing controversy, in effect. Now, of course, so far as this matter is concerned, this instant case, it has to be decided basically on the facts applicable to it. That is not offered for any purpose to show that this Mathis project is a covered project, or that the compensation practices were in violation, but merely to show the fact that the defendant has repeatedly been investigated and advised with reference to the Fair Labor Standards Act.

The Court: Repeatedly? There is one lawsuit.
107 Is the record in there that he has been repeatedly investigated?

Mr. Campbell: There is one lawsuit. There have been some six investigations, other than the one upon which that lawsuit was based, and the one upon which this lawsuit was based. There has been a total of eight investigations.

The Court: And two lawsuits since 1941?

Mr. Campbell: Yes, sir.

The Court: This one and the other one?

Mr. Campbell: Yes, sir.

The Court: It may mean a lot to somebody else, but it doesn't mean anything to me. I am going to strike it, and you may have your exception.

Mr. Wood: Your Honor, in view of the ruling of the Court on that,—

The Court: You withdraw your offer of—

Mr. Wood: We had in mind putting on two witnesses to go into those facts that were raised, and some testimony on that, and in view of the Court's ruling, as I understand it now, he strikes the New Mexico proceedings.

The Court: Yes, sir, it doesn't mean anything to me. He has it in the record. If it means something
108 to the Appellate Court, why, all right. It is not going to help me any, and doesn't mean anything to me.

Mr. Wood: Will you let us confer just a moment here at the table, Your Honor?

The Court: Yes, sir. I will use long distance, anyway, here a minute while you are conferring.

Mr. Wood: Your Honor, we are going to put the two witnesses on, but they will be brief.

The Court: All right, I will talk on this long distance call, and be right back.

(Whereupon a short recess was taken, after which the following proceedings were had.)

The Court: All right, proceed, gentlemen.

109 **Amado Cavazos.**

having been previously sworn on oath, testified further as follows:

Direct Examination

By Mr. Callender:

Q. You were sworn this morning, weren't you? A. Yes, sir.

Q. For whom do you work? A. H. B. Zachry Company.

Q. How long have you worked for H. B. Zachry Company? A. Since November 15, 1928.

Q. What are your present duties? A. The title is treasurer, the duties are supervision of financial and accounting matters for H. B. Zachry Company.

Q. Are the payroll records for all of the construction jobs in your office under your supervision and control? A. Yes, sir.

Q. Now in connection with those completed jobs and the payroll records in reference thereto, have you prepared, at our request, some data concerning those jobs?

110 A. Yes, sir.

Q. Do you have that before you? A. Yes, sir.

Q. All right. Now directing your attention to projects completed in 1956, do you have a total number that were completed in 1956? A. Yes, sir, 78.

Q. All right. What was the total volume of those 78 contracts? A. Thirty four million three hundred and fifty two thousand two hundred dollars.

Q. Do you have a record before you of the number of jobs out of that 78 in which you paid, or which the

defendant paid time and a half for all hours over eight and over 40? A. Yes, sir.

Q. How many are those? A. Nine projects.

Q. Nine projects? A. Yes, sir.

Q. For how much? A. Fifteen million four hundred forty three thousand nine hundred.

Q. Now on those nine jobs, you paid time and a
111 half over eight and over 40? A. Yes, sir.

Q. Do you have a number in which you paid time and a half only for eight hours work? A. Yes, sir.

Q. How many? A. Four projects.

Q. What was the total volume of those? A. Four million ninety four thousand eight hundred.

Q. All right. Now do you have broken down the number of jobs in which you paid overtime for all hours after 40, in compliance with the Fair Labor Standards Act? A. Yes, sir.

Q. What number are those? A. 65 projects.

Q. 65 projects.

The Court: Repeat that, 65 projects in which you did what?

A. In which time and a half was paid for all hours after 40, as required by the Fair Labor Standards Act.

Q. What was the total amount of those 65? A. You men contracts?

Q. Yes. A. Fourteen million nine hundred thirteen
112 thousand five hundred.

Q. Now out of 78 jobs that you completed in 1956, you complied with the requirements of the Fair Labor Standards Act in all of those but four, is that right? A. Yes, sir.

Q. What percentage does that bear? Do you have a percentage? A. Five and one tenths percent of 78.

Q. Would that be 94.9 percent compliance in all jobs completed in 1956? A. Yes, sir.

Q. Now, 1957, what was the total?

The Court: What percentage was that?

Mr. Callender: 94.8, I believe, Judge.

A. 94.9.

Q. Now in 1957 how many jobs did you complete? A. 74.

Q. What was the amount of those 74 jobs? A. Twenty million, if I may leave off the hundreds.

Q. All right. Now how many jobs of those 74 did you pay only for time and a half after eight? A. Only one.

Q. Only one. All right, how many of those jobs did you pay time and a half for all hours worked over 40? A. 61.

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Q. What is the total volume of that? A. Eleven million four hundred sixty five thousand.

Q. Now how many of those jobs did you pay time and a half over eight and also over 40? A. Twelve projects.

Q. All right, how much is that? A. Two million six hundred and sixty nine thousand.

Q. All right. Now these 74—

The Court: How much was that last? A. Two million six hundred and sixty nine thousand dollars.

Q. Of those 74 jobs, how many of those jobs were under the Fair Labor Standards Act in which you paid time and a half over 40 total? A. 73.

Q. And how many were not? A. One.

Q. One. What percentage does that bear to the whole? A. One and four tenths per cent, approximately.

Q. All right. Now do you have the number of jobs in process for 1958? A. Yes, sir.

Q. How many jobs were in progress at the be-

114 ginning of 1958? A. We had 33 projects going.

Q. What was the total amount of those contracts? A. Twenty three million ninety seven thousand.

Q. Of that number, how many were under the act? A. 31.

Q. Can you give us a total of those 31 jobs? A. Let me add up two figures. Twenty two million sixty one thousand.

Q. All right. Now of that number, how many were contracted not under the act? A. Only two.

Q. And how much is that contract for? A. One million thirty six thousand.

Q. Now of those jobs that were contracted under the provisions of the Fair Labor Standards Act, what is the percentage that bears to the total number of jobs in which you have paid according to the act? A. Six and one tenth percent. You say not covered?

Q. No, that were covered. A. I am sorry. Ninety three and nine tenths percent.

Q. In other words, in 93.9 percent of the cases, you pay according to the Fair Labor Standards Act, is that
115 right? A. Yes, sir.

Q. Now have you made a recapitulation of those years, 1956, '57 and the 1st of January of 1958? A. Yes, sir.

Q. All right, what were the total number of jobs, either completed during 1956 and '57, and/or in progress at the beginning of 1958? A. 185 jobs.

Q. What was the total volume of those contracts? A. Seventy eight million three hundred eighty three thousand.

Q. Now of that total of one hundred eighty five, what was the total number of those that you paid according to the provisions of the Fair Labor Standards Act? A. 178.

Q. 178 out of the total of 185. There were seven, I take it, that were not contracted to be under the act? A. Yes, sir.

Q. Is that right? A. Correct.

Q. Now percentage wise, what percent does the total number of jobs that you have complied with the act bear to the total number of jobs that you had? A. 96.2
116 percent were considered covered by the act.

Q. All right. What percent was considered not covered? A. 3.8, three and eight tenths percent.

Mr. Callender: Pass the witness.

Cross Examination

By Mr. Campbell:

Q. Mr. Cavazos, those jobs you listed here, does that include this Mathis project? A. Yes, sir.

Q. Did you know when this Court ruled that that project was subject to the Fair Labor Standards Act in December? A. I didn't understand it was a ruling to that effect, I understood it was a tentative opinion. I wasn't given the information that way, no, sir.

Mr. Wood: Your Honor, that ruling was not the nature of a final judgment or anything.

The Court: That's right.

Mr. Wood: So we object to the question.

The Court: Let him cross examine. It is all
117 right.

Mr. Wood: Yes, sir.

Mr. Campbell: He said he didn't understand it that way, Your Honor, so I think that answers the question. That's all.

Mr. Callender: Step down, Mr. Cavazos. Mr. Zachry.

H. B. Zachry.

having been first duly sworn on oath, testified as follows:

Direct Examination

By Mr. Callender:

Q. Will you please state your name. A. H. B. Zachry.

Q. And where do you live, Mr. Zachry? A. In San Antonio, Texas.

Q. And how old are you? A. 56.

Q. Have you lived in Texas all of your life? A. Yes, sir.

118 Q. Do you have a family? A. I do.

Q. What does that consist of? A. I have a wife, five children and one grandchild.

Q. I see. What is your business or occupation? A. General contractor.

Q. How long have you been engaged in that business? A. Under my own name, since 1924, which would be 34 years.

Q. 34 years. Mr. Zachry, can you give us an approximation as to the total number of jobs you have completed since you have been in the business? A. Yes, sir, it would be approximately 1200.

Q. 1200. Now can you give us, in volume, dollarwise in volume, approximately how much all of those contracts have amounted to? A. It would be in excess of three hundred million.

Q. In excess of three hundred million. Is it true that you have never been in Court with the Department of Labor on a Fair Labor Standards suit, with the exception of today, and the suit in New Mexico? A. That's correct.

Q. Those are the only two times that you have ever been in Court over a Fair Labor Standards Act case? A. Yes, sir.

119 Q. Have you ever been sued by an employee for overtime wages? A. No, sir.

Q. Never since you have been in business, is that right? A. That's correct.

Q. Did you attend college? A. I did.

Q. Where? A. Texas A & M.

Q. Do you have any affiliation with that college now? A. I am on the Board of Directors.

Q. On the Board of Directors. At the present time, can you give us approximately the number of jobs you have going when it is not raining? A. If I remember correctly, Mr. Cavazos stated that it was 33. It is somewhere in that neighborhood.

Q. Can you tell us in what states these jobs are being operated? A. Well, I have not refreshed my memory on that, but offhand, I know we are working in Texas, in Louisiana, in Missouri, in New Mexico, those are the only ones I am certain of.

Q. Can you tell us approximately how many employees you have presently on your payroll, an approxima-
120 tion? A. Somewhere around 1500.

Q. Now do you belong to the AGC? A. Yes, sir.

Q. What is that? A. It is the Associated General Contractor or trade association.

Q. Does it consist of contractors? A. Right.

Q. In your present work, can you tell us briefly what that consists of? A. Well, the members of that association do approximately 90 percent of the construction work that is done in the United States.

Q. Now does your company, Mr. Zachry, have a policy, a company policy with regards to compliance with the Fair Labor Standards Act? A. We do.

Q. Just tell the Court briefly what you do in regard to the wage and hour division of the Fair Labor Standards Act. A. We necessarily bid on a great number of jobs, many more than we are awarded the contract for. Unless the type of job that is being bid on runs in a standard form, or is considered originally as being under the
121 wage and hour law, we ask our legal department for a preliminary opinion as to whether that job is or is not under that act.

Q. Do they give that to you? A. They do.

Q. All right, sir. Then what occurs? A. Then we figure the job accordingly. Q. All right, sir. Now who is in your legal department besides myself? A. Mr. Chester Johnson is head of it. You and Mr. O. D. Height and Mr. Gregory.

Q. All right. Do you rely upon that opinion in making your bids as to whether or not the individual job is covered by the act? A. We very definitely do. These jobs are highly competitive, and it is necessary for us to know so that we can take advantage of whatever rate is to be paid in figuring the costs to go into that bid.

Q. All right. Do you have a man working for you named Mr. E. M. Hammon? A. I do.

Q. What is his duty with your company? A. He is principally responsible as to police our jobs, check with the field office and see about our compliance with our
122 labor requirements. His second job is to check on our safety procedures and hold, or direct the holding of safety meetings.

Q. Do you know of your own knowledge whether or not Mr. Hammon has met with Mr. Earl Street, the regional attorney for the Department of Labor in Dallas, to confer about particular jobs being covered or not covered? A. Yes, sir, he meets with him. He is a member of your State Board, and also on the AGC committee. He is to confer with them and accept and carry out certain rulings that have been had and then passed upon as being the correct ones to use.

Q. Do you know of your own knowledge whether or not Mr. Hammon also meets with the attorneys for the Labor Department in Washington regarding coming under the wage and hour law? A. He has on several occasions at our request.

Q. Now Mr. Zachry, has it been your experience in the past, and is it your intention now, as well as in the future, to comply with the provisions of the Fair Labor Standards Act, when it is applicable to a job? A. It always has been, it is now and will be.

Mr. Callender: Pass the witness.

123 Cross Examination

By Mr. Campbell:

Q. Mr. Zachry, have you any idea what amount of overtime is due the employees on the Mathis job? A. No, sir, I don't think there is any that is due them.

The Court: He is asking, Mr. Zachry, if it is covered by the act, if I am right on this preliminary opinion that I gave. That is the premises of your question?

Mr. Campbell: Yes, Your Honor.

The Court: Which, of course, if I hold that, ultimately you will probably want to test it out, but he is asking you if you are under the act, do you have any idea how much overtime would be due to your employees? A. Something in the neighborhood of $50,000.00.

Q. Were you advised of the decision of this Court in this matter that was handed down in December? A. It was my understanding that there was no firm decision.

Q. I asked you, were you advised of what the decision was? A. No, sir, I say it was my understanding
124 there was no decision handed down from the Court.

Q. You made no change in your compensation practice at that time? A. We have not.

Mr. Campbell: I believe that's all.

Redirect Examination

By Mr. Wood:

Q. About this job, the Mathis Dam job, Mr. Zachry, when you bid on that, did you have an opinion from your attorney as to whether or not the job was covered by the Labor Relations Act? A. Yes, sir.

Q. What was it? I mean the Fair Labor Standards Act, excuse me. What did your attorneys advise you about that? A. They told us, in their opinion, it was not. After we had started work on the job, we asked them to again review it and to give us a written opinion as to whether there was any change in their previous oral opinion or not.

Q. Did they later give you a written opinion? A.
125 They did.

Q. And that written opinion was to the effect that the job was not covered? A. That's right.

Mr. Wood: That's all.

Mr. Callender: Your Honor, the defendant at this time rests and closes.

Mr. Campbell: The plaintiff has nothing more.

The Court: Maybe Mr. Zachry can answer this question that occurs to me. Mr. Cavazos testified there are 40 or 50 still employed up there, Mr. Zachry, I believe that is what he said, in connection with some of these wells. How much longer do you anticipate this Mathis Dam project is going to continue, and you will have employees up there? A. Well, barring continued rainy weather, we would be through within 30 days.

The Court: If you get 30 days of good weather, you will be through? A. Yes, sir.

Mr. Callender: In view of the Court's question, may I ask one question?

The Court: Yes, sir.

126 Mr. Callender: In the drilling of these wells, which the Judge asked you about, is that under subcontract to another concern? A. Yes, sir, we have subcontracted that to Lane-Texas Company.

The Court: Maybe I had that confused.

Then what are these employees doing up there? A. Part of them are working for Lane-Tex.

The Court: Subcontract? A. Yes, sir.

The Court: And the others, what are they doing? A. Well, there is a certain part of that work, like when we finish drilling those wells, we have to case them in concrete, and those items are being done by our own forces. It is a small amount of work.

The Court: All right.

Mr. Campbell: May I go into that very briefly?

The Court: Yes, sir.

Recross Examination

By Mr. Campbell:

Q. Mr. Zachry, are you doing any clean-up work? A. No, sir.

Q. Not removing any trees or shrubbery? A. No, sir.

Mr. Campbell: That's all.

Mr. Callender: We have no further questions. Step down, Mr. Zachry.

Renewal of Motion to Dismiss

Mr. Wood: Your Honor, we renew our motion we made this morning, and we just very hastily compiled a memorandum to present to you on it, and don't expect you to read it right now, of course. We simply tore out a couple of decisions and attached a copy of the committee report that we referred to.

The Court: All right, I would like to review this a little further before I pass finally on it.

Mr. Wood: We would like to have an opportunity, if we could, Your Honor, to file an additional brief on some
128 more authorities we have. That, of course, was very hastily prepared.

The Court: Have you furnished Counsel with a copy of your brief?

Mr. Wood: Yes.

The Court: Well, gentlemen, this case will be submitted Monday week. Get your briefs in by that time. All right.

Mr. Campbell: In other words, you want the briefs submitted simultaneously, Your Honor?

The Court: That will be all right. You have most of theirs, anyway. I suppose they have furnished you with a copy of this?

Mr. Campbell: Yes, sir.

The Court: All right, I will regard it submitted Monday week, March 3rd. All right.

129 (Reporter's Certificate to foregoing transcript omitted in printing.)

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130 IN UNITED STATES DISTRICT COURT

Docket Entry—Dated February 21, 1958

Trial on merits—Evidence heard—Briefs to be filed on or before 3/3/58, at which time matter will be regarded as submitted. J.V.A.

131 IN UNITED STATES DISTRICT COURT

Trial Amendment—Filed February 21, 1958

Now comes Defendant, H. B. Zachry Company, and leave of Court having been first obtained, files this Trial Amendment, and would respectfully show:

I.

In the case styled JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF, VS. H. B. ZACHRY COMPANY, a corporation, DEFENDANT, CIVIL ACTION FILE NO. 2704, IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO, filed October 28, 1954, Plaintiff alleged:

"V.

"Defendant repeatedly has violated and is violating the provisions of Section 7 and 15(a)(2) of the Act by employing many of its employees in interstate commerce, within the meaning of the Act, as aforesaid, for workweeks longer than 40 hours since February, 1941, without compensating these employees for their employment in excess of 40 hours, in workweeks during such period, at rates not less than one and one-half times the regular rate at which they were employed.

132 "VI.

"Defendant has, since the effective date thereof, repeatedly violated the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act."

II.

The judgment in the above cause filed January 13, 1955, and the order amending such judgment filed January 14, 1955, show that while the Court held that the Holloman Air Force Base at Alamagordo, New Mexico, was covered by the provisions of the Fair Labor Standards Act and restrained Defendant from violating the provisions of the

Act while engaged in such construction, the Court did not grant the blanket injunction prayed for in the complaint that it permanently enjoin Defendant from violating the provisions of Section 15(a)(2) of the Act, and the judgment expressly found that the Defendant, H. B. Zachry Company, at all times material hereto, in its actions in contending that the Fair Labor Standards Act of 1939, same being Title 29, U. S. Code 201 et seq., did not apply to the contract in this cause, so acted in good faith and pursuant to legal opinions furnished to its officers by its attorneys.

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III.

Accordingly, in the above cause, Plaintiff actually did, or at least could have, put in issue every claimed violation of the Act by Defendant that had occurred prior to such suit, and such being the case, the judgment rendered fixes and establishes the rights of the parties as of the date of such judgment and gave the Plaintiff all the relief to which it was entitled by virtue of the issues raised, and such judgment is res adjudicata and the Plaintiff cannot at this time re-litigate the issues that were and could have been so adjudicated in said cause.

IV.

As is shown above, the case in the United States District Court for the District of New Mexico was one between the same parties who are in this cause, said judgment referred to is a final judgment and no appeal was prosecuted therefrom.

WHEREFORE, Defendant prays as in its Original Answer.

(s) CHESTER H. JOHNSON

(s) SIDNEY D. CALLENDER

(s) R. DEAN MOORHEAD

(s) ALLEN WOOD

134 IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

Memorandum Opinion—March 14, 1958

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For Defendant

March 14, 1958.

Action by the Secretary of Labor to restrain defendant from violating section 15(a)(2) of the Fair Labor Standards Act, 29 U.S.C.A. 201 et seq., by failing to pay time and one-half to its construction employees for all work in excess of 40 hours per week. A hearing was had before the court on October 4, 1957, as to whether a preliminary injunction should issue. At that time the court held
135 that defendant's construction employees, engaged in the construction of the Wesley E. Seale dam on the Nueces river, were within the coverage of the Fair Labor Standards Act; but the court declined to issue the preliminary injunction until the case could be fully and finally

developed on the merits. Trial has now been had and by stipulation all of the evidence taken on the hearing for preliminary injunction has been incorporated as a part of the record here.

The memorandum of this court, dated December 10, 1957, dealing with the hearing on the preliminary injunction is hereby adopted for all purposes and the same findings of fact are now made as supplemented by any statements made herein.

Defendant now points to the fact that the time and one-half provision of the Fair Labor Standards Act applies to employees: (1) engaged in commerce or (2) in the production of goods for commerce; that the first class consists of those engaged in the actual movement of commerce, or in connection with instrumentalities which make possible such movement as persons working on interstate highways, railroad bridges, interstate canals, etc.; and that this court principally relied upon an "in commerce" case, Mitchell v. Vollmer, 349 U.S. 427, 75 S. Ct. 860, which dealt with employees working on an alternate lock
136 and canal forming a part of the Gulf Intercoastal Waterway.[1]

Defendants point out that here Zachry's employees admittedly are not engaged in the actual movement of commerce or in connection with the instrumentalities of such movement; that neither are they engaged in the production of goods for commerce and could not come under the Act except for the provision in subdivision (j) of section 203 of the statute, defining "produced" as meaning an employee engaged "in *any closely related process* or occupation *directly essential* to the production" of goods for commerce.[2] Pointing to the fact that the statute formerly read: "in any other manner working on such goods or in any process or occupation *necessary* to the production thereof, in any State" was changed by an amendment in 1949 to the present language, defendant insists that Congress

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[1] The same observation may be made with reference to two other cases cited in this court's original memorandum: (a) Tobin v. Ramey, 5 Cir., 205 F. 2d 606; and (b) Archer v. Brown & Root, Inc., 5 Cir., 241 F. 2d 663.

[2] Emphasis supplied throughout this memorandum unless otherwise indicated.

intended to narrow the scope of coverage;[3] and says that its employees are not engaged in any process or
137 occupation *closely related* or *directly essential* to the production of goods for commerce.

It cannot be disputed that Congress intended to narrow the scope of coverage by the 1949 amendment; and this court perhaps placed too much reliance upon Mitchell v. Vollmer, supra, since that case dealt with employees "engaged in commerce" itself and the test there laid down was, not whether the work is new construction, but whether it is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated, local activity. That test is inapplicable where coverage is bottomed, as here, on "production of goods for commerce," in which case the rule that contractors engaged in *original* construction generally are not engaged in commerce does *not* apply to *repair* or *replacement* of existing facilities, Chambers Construction Company v. Mitchell, 8 Cir., 233 F 2d 717. This was recognized by both parties when briefs were filed on the preliminary injunction, defendant contending that the Wesley Seale Dam was *new construction*, plaintiff that it was *repair* and *replacement* of an old facility. This court held that it was an enlargement of the existing facilities, "at once an improvement, a rebuilding and a new construction."

138 This court cited, among other cases, the Chambers case supra in which city water was sold to railroads which used it continuously in interstate commerce and to others who used water incident to the manufacture of products distributed and sold in interstate commerce. It was there held that construction of a new segment of the city's water supply main, crossing a river as a replacement for similar segment, constituted a replacement or repair, not new construction, and, therefore came within the Fair Labor Standards Act.

This court also cited Mitchell v. Chambers const. Co., 10 Cir., 214 F 2d 515, wherein a project to augment a city's

[3] Citing the Labor Department's Administrative Regulations, sections 776.0 to 776.30 of the Code of Federal Regulations, 3 C.C.H. Labor Law Rep., sec. 24,102.17; Mitchell v. Moore, 6 Cir., 241 F. 2d 249; Mitchell v. Jaffe (D.C., Ala.), 156 F. Supp. 596.

water supply was held to be an addition to, or enlargement of an existing water system and covered by the act notwithstanding that it was physically removed from the existing system and not immediately connected to the city's distribution system. Both of the Chambers Construction Company cases were decided after the 1949 amendment and the facts there are similar to those here, the only distinction being that here the District intervened between defendant and the city, one step removed from the two Chambers cases. But, as pointed out in the original memorandum:

"The contracts between defendant and the District on the one hand and the City of Corpus Christi and the
139 District on the other have been introduced in evidence. While defendant is an independent contractor, contracting with the District, a separate and distinct political entity from the city, consideration of both contracts and the complete picture presented by the evidence clearly discloses that the purpose of the new dam was to provide a tremendously enlarged reservoir, which will inundate the existing dam and reservoir and furnish an adequate water supply for the city.[3]

This court adheres to the previous holding that defendant's construction workers are covered by the Act. Defendant says the Government has not sustained its burden of proving that the activities of its employees rather than the activities of defendant, are closely related, or directly essential, to the production of goods for commerce; but, at the outset of the previous hearing, when defendant requested the names of the affected employees, it was stated that the actual construction workers only were involved. Defendant's counsel expressed satisfaction
140 with this statement. The case has been tried on the theory that those engaged in actual construction work only were involved.

There remains the question of whether a permanent injunction shall issue; and, if so, the scope thereof. Plaintiff insists that the injunction should issue, offering in

[3] Footnote 3 of former memorandum: The boundaries of the District are not co-extensive with the city's. The contract bound the city to furnish water to any resident of the district.

evidence the record of a previous proceeding against defendant in the United States District Court in New Mexico. The court sustained defendant's objections to the introduction of the record in that case. However, on brief, defendant has referred to the New Mexico case as though it was in evidence; therefore, the court changes the previous ruling and admits that record in evidence, although, as stated at the time, it has very little bearing on the issues here.

Whether an injunction shall issue still rests in the sound discretion of the trial court.[4] Pointing to evidence that (1) during the past three years defendant has handled 185 jobs with a value of over seventy-seven million dollars in which the employees had been paid overtime in accordance with the Fair Labor Standards Act formula on 178 jobs, or 96.2% of the total; (2) that it was advised
141 by its legal department that the Wesley Seale Dam job did not come within the Act; (3) the testimony of its president that defendant desired to comply with the Act where it was applicable; and (4) to other factors, defendant insists that the court should not issue an injunction, either as to the present case or generally. Plaintiff, on the other hand, points to: (1) the New Mexico injunction; (2) the decisions in the two Mitchell cases cited above and others which show that defendant's operations on the Seale Dam were clearly covered by the Act; (3) that while defendant may have been in compliance on 96.2% of all *jobs* performed, yet on a dollar value basis it has only been in compliance on 84.7%; and (4) because defendant has not complied with the Act since the holding of this court on December 10, 1957, that it was subject to the Act.

Defendant's activities had been going on for almost two years, and an investigation had been made at least six months before plaintiff's complaint was filed September 12, 1957, at which time a preliminary injunction was sought because the project was almost completed. A hearing was held October 4, 1957. The court's memorandum was filed December 12, 1957, denying the petition for preliminary injunction and setting a hearing upon the merits for

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[4] Mitchell v. Bland, 5 Cir., 241 F. 2d 808; Mitchell v. Hodges Contracting Company, 238 F. 2d 380.

January 17, 1958. On January 4, 1958, the hearing
142 was re-set, by agreement of the parties, for February 21, 1958, at which time it was completed. At that time defendant's president estimated the project would be finished in 30 days.

In the exercise of discretion, the court will order an injunction on the particular project as to the construction employees only. I do not know whether the matter will become moot or not before an appeal can be taken; but, in any event, no great harm will come if the court is in error. The court declines to enjoin defendant generally, finding that defendant has acted in good faith and that there was room for an honest belief by defendant that the project was not covered. The court does not feel that defendant should act at his peril in connection with all projects in the future.

The Clerk will notify counsel to submit an order accordingly.

(s) JAMES V. ALLRED
Judge

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143 IN UNITED STATES DISTRICT COURT

Judgment—April 3, 1958

This cause having come on to be heard and the Plaintiff appearing through his attorneys and the Defendant being present in Court with its attorneys, and the Court having heard the evidence and being duly advised in the premises, finds:

1. That the Court has jurisdiction of the parties and the subject matter.

2. That the Defendant acted in good faith at all times material hereto.

3. That the Defendant should be enjoined from violating the provisions of the Fair Labor Standards Act of 1938, as amended, while engaged in the performance of that certain construction contract between the Lower Nueces River Water Supply District and Defendant, dated October 21, 1955, and while Defendant is engaged in the

construction of the Wesley E. Seale dam on the Nueces River near Mathis, San Patricio County, Texas, pursuant to the terms of said contract.

Wherefore, it is hereby ORDERED, ADJUDGED AND DECREED THAT Defendant, its officers, agents, servants, employees, and all persons acting, or claiming to act, in its
144 behalf and interest, be and they hereby are restrained and enjoined from violating the provisions of the Fair Labor Standards Act, as amended, 29 U. S. C. A. 201, et seq. (Act of June 25, 1938) hereinafter referred to as the "Act," while engaged in the performance of that certain construction contract between the Lower Nueces River Water Supply District and Defendant covering the construction of the Wesley E. Seale Dam on the Nueces River near Mathis, San Patricio County, Texas, dated October 21, 1955, in the following manner:

The Defendant shall not, contrary to Section 7 of the Act, employ any of its non-exempt construction workers on the dam site who are engaged in the production of goods for commerce, as that term is defined by the Act, for workweeks longer than 40 hours, unless the employee receives compensation for his employment in excess of 40 hours at a rate not less than one-and one half times the regular rate at which he is employed.

It is further ORDERED, ADJUDGED AND DECREED THAT Plaintiff have and recover his cost.

To all of which the Defendant objects and excepts.

145 DATED AND ENTERED this 3rd day of April, 1958.

(s) JAMES V. ALLRED
United States District Judge

APPROVED AS TO FORM:

.....

.....
Attorneys for Plaintiff

.....

.....
Attorneys for Defendant

146 IN UNITED STATES DISTRICT COURT

Notice of Appeal—Filed May 22, 1958

TO THE HONORABLE JUDGE OF SAID COURT:

Notice is hereby given that H. B. Zachry Company, Defendant above named, hereby appeals to the Circuit Court of Appeals for the Fifth Circuit from the judgment and order entered in this action restraining and enjoining the Defendant, its officers, agents, servants, employees and all persons acting or claiming to act in its behalf and interest from violating the provisions of the Fair Labor Standards Act as amended, 29 U.S.C.A. 201, et seq., while said Defendant is engaged in the performance of that certain construction contract between the Lower Nueces River Water Supply District and the Defendant covering the construction of the Wesley E. Seale Dam on the Nueces River near Mathis, San Patricio County, Texas, said judgment having been entered in this action on April 3, 1958.

147 DATED this 21 day of May, 1958.

(s) CHESTER H. JOHNSON

(s) SIDNEY CALLENDER
1109 Transit Tower
San Antonio, Texas

(s) ALLEN WOOD
Driscoll Building
Corpus Christi, Texas

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153 IN UNITED STATES DISTRICT COURT

Notice of Appeal—Filed May 23, 1958

Notice is hereby given that James P. Mitchell, Secretary of Labor, United States Department of Labor, plaintiff above named, hereby appeals to the Court of Appeals for the Fifth Circuit from that portion of the final judgment entered in this action on the third day of April, 1958, in so far as it is, by its terms, limited to the performance of the construction contract between the Lower Nueces River Water Supply District and the defendant, H. B. Zachary Company, a corporation, dated October 21, 1955,

and while the defendant is engaged in the construction of the Wesley E. Seale Dam on the Nueces River near Mathis, San Patricio County, Texas, under the terms of that contract.

(s) STUART ROTHMAN
Solicitor

(s) EARL STREET
Regional Attorney

(s) HARRY CAMPBELL, JR.
Assistant Regional Attorney

UNITED STATES DEPARTMENT
OF LABOR

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154 IN UNITED STATES DISTRICT COURT

Concise Statement of Points on Which Defendant-Appellant Intends to Rely on Appeal—Filed June 6, 1958

Comes Now Defendant -Appellant H. B. Zachry Company and pursuant to Rule 75(d) of the Federal Rules of Civil Procedure files this its Concise Statement of the Points on Which Defendant-Appellant Intends to Rely on Appeal of this cause to the Circuit Court of Appeals, Fifth Circuit, New Orleans, Louisiana:

1. The trial court erred in holding that the activities of Defendant's construction employees were closely related and directly essential to the production of goods for commerce because there was no evidence whatsoever introduced or offered concerning the activities of any single construction employee of Defendant.

2. The trail court erred in holding that Defendant's construction employee, that is, those construction employees engaged in the construction of the Wesley E. Seale Dam on the Nueces River near Mathis, San Patricio County, Texas, were engaged in the production of goods for commerce.

3. The trial court erred in failing to hold that
155 the construction of the Wesley E. Seale Dam was a local project and hence without the provisions of

the Fair Labor Standards Act as amended, 29 USCA 201, et seq.

4. The trial court erred in failing to hold that the activities of the construction employees of the Defendant were too remote from the production of goods for commerce and hence without the provisions of the Fair Labor Standards Act as amended, 29 USCA 201, et seq.

5. The trial court erred in granting an injunction against the Defendant because the Plaintiff failed to prove that the activities of the Defendant's employees were closely related and directly essential to the production of goods for commerce.

6. The trial court erred in denying Defendant's Motion for a more Definite Statement.

7. The trial court erred in overruling Defendant's Motion to Dismiss at the conclusion of Plaintiff's evidence.

DATED June 2, 1958.

(s) CHESTER H. JOHNSON

(s) SIDNEY CALLENDER
501 Transit Tower
San Antonio, Texas

156 (s) ALLEN WOOD
Driscoll Building
Corpus Christi, Texas

(s) R. DEAN MOORHEAD
328 Perry Brooks Building
Austin, Texas
Attorneys for Defendant-Appellant

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157 IN UNITED STATES DISTRICT COURT

Motion to Send Original Exhibits—Filed June 6, 1958

Plaintiff-Appellee James P. Mitchell, Secretary of Labor, and Defendant-Appellant H. B. Zachry Company hereby move the Court that the original of the following exhibits used in the trial of the above entitled and numbered cause now on appeal be sent to the United States Court of

Appeals for the Fifth Circuit at New Orleans, Louisiana in lieu of copies thereof for the reason that the exhibits are extremely lengthy and technical encompassing drawings, plats, pictures, plans and specifications and that photostating or other means of copying said exhibits would constitute an insurmountable task:

Plaintiff's Exhibit No.

1. Water Contract
2. Summary Report of Bond Issue
3. Bond Election Order
4. Preliminary Circular
5. Photograph of Wesley Seale Dam
6. Records of Sale of Water for Corpus Christi
158 7. Contract of Water District and H. B. Zachry Company

DATED this 6th day of June, 1958.

(s) CHESTER H. JOHNSON

(s) SIDNEY CALLENDER
501 Transit Tower
San Antonio, Texas

(s) ALLEN WOOD
Driscoll Building
Corpus Christi, Texas
Attorneys for Defendant-Appellant

(s) STUART ROTHMAN
Solicitor

(s) EARL STREET
Regional Attorney

(s) HARRY CAMPBELL, JR.
Assistant Regional Attorney

UNITED STATES DEPARTMENT OF LABOR

Attorneys for Plaintiff-Appellee

159 IN UNITED STATES DISTRICT COURT

Order to Transmit Original Exhibits—Entered and Filed June 7, 1958

Came on to be heard the joint motion of Plaintiff-Appellee, James P. Mitchell, Secretary of Labor, and Defendant-Appellant, H. B. Zachry Company, that the originals of the following exhibits used in the trial now on appeal be sent to the United States Court of Appeals for the Fifth Circuit at New Orleans, Louisiana in lieu of copies thereof, and it appearing to this Court that such original exhibits should be inspected by such Appellate Court and also that photostating or other means of copying said exhibits would constitute an insurmountable task;

It is ORDERED that the originals of the following exhibits be sent to the United States Court of Appeals for the Fifth Circuit in lieu of copies thereof:

Plaintiff's Exhibit No.

1. Water Contract
2. Summary Report of Bond Issue
3. Bond Election Order
4. Preliminary Circular
5. Photograph of Wesley Seale Dam

160 6. Records of Sale of Water for Corpus Christi
7. Contract of Water District and H. B. Zachry Company

ENTERED this 7th day of June, 1958.

(s) JAMES V. ALLRED
United States District Judge

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161 IN UNITED STATES DISTRICT COURT

Motion to Transmit Original Papers—Filed May 31, 1958

Comes now plaintiff, James P. Mitchell, Secretary of Labor, United States Department of Labor, appellee and cross-appellant, and respectfully moves the Court to transmit the originals of Government's Exhibit I, offered in evidence at the trial of the above cause on February 21, 1958, and the interrogatories served by plaintiff upon the

defendant and filed in this cause on the 12th day of October, 1957, together with the answers to such interrogatories filed in this cause on October 25, 1957, which were also offered in evidence in this cause. In connection therewith plaintiff respectfully shows that said exhibits are lengthy and that the copying thereof would materially increase the expense of the parties herein.

(s) STUART ROTHMAN
Solicitor

(s) EARL STREET
Regional Attorney

(s) HARRY CAMPBELL, JR.
Assistant Regional Attorney

UNITED STATES DEPARTMENT
OF LABOR

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162 IN UNITED STATES DISTRICT COURT

Order to Transmit Original Papers—June 3 and 4, 1958

Now on this 3rd day of June, 1958, the Court, having considered the motion of the plaintiff herein to transmit to the Court of Appeals Government's Exhibit I, which was duly offered in evidence at the trial of the above styled and numbered cause on February 21, 1958, as well as certain interrogatories and answers thereto similarly offered in evidence at said trial, and being fully advised in the premises, is of the opinion that said motion should be granted.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Government's Exhibit I, offered in evidence at the trial of this cause on February 21, 1958, and the interrogatories filed herein on October 12, 1957, and the answers thereto filed on October 25, 1957, be, and the same are hereby, ordered transmitted to the Court of Appeals for the Fifth Circuit in connection with the foregoing appeal.

(s) JAMES V. ALLRED
United States District Judge

163 Clerk's Certificate to foregoing transcript omitted in printing.

(File endorsement omitted)

164 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

CIVIL ACTION File No. 1645

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor, *Plaintiff*

v.

H. B. ZACHRY COMPANY, a corporation, *Defendant*

Interrogatories—Filed October 12, 1987

Comes now James P. Mitchell, Secretary of Labor, United States Department of Labor, plaintiff above named, and serves the following interrogatories on the defendant, H. B. Zachry Company, a corporation, in accordance with Rule 33 of the Federal Rules of Civil Procedure, to be answered under oath within fifteen days of the date of service hereof:

I.

Please state whether, in February 1941, the defendant's operations were investigated, covering the period from on or about June 1, 1940, to December 31, 1940, during which period the defendant was engaged in highway reconstruction, maintenance and repair.

II.

Please state whether, in November 1943, an investigation was made of the operations of said company covering the period from January 1, 1941, to November 7, 1943, during which period defendant was engaged in the construction, maintenance, reconstruction, repair of highways, air fields, etc.

III.

Please state whether, in December 1945, the defendant's operations were investigated, covering the period from

Novmber 7, 1943, to December 31, 1945, during which period defendant was engaged in the construction, reconstruction, maintenance and repair of railroads and highways, and in the operation of a quarry from which gravel was produced to be used in the aforesaid work.

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IV.

Please state whether, in October 1950 and October 1951, the defendant's operations were investigated covering the period from October 22, 1948, to October 18, 1951, during which period the defendant was engaged in reconstruction and extension of power lines.

V.

Please state whether an investigation was made of the operations of the defendant in August 1955 covering the period from February 5, 1955, to August 7, 1955, during which period was engaged in the construction of additional track facilities for the Atcheson, Topeka and Santa Fe Railroad, between Sanger, Texas, and Dallas, Texas.

VI.

Please state whether, in March 1957, the operations of the defendant were investigated covering the period from October 28, 1956, to April 6, 1957, during which period the defendant was engaged in the construction of an extension to the pipeline of the Texas Eastern Transmission Company, the original pipeline of said concern reaching from the State of Texas to the State of New Jersey.

VII.

Please give the name of the official, or officials, of the defendant with whom conferences were held at the conclusion of each of the investigations inquired about in Interrogatories I through VI.

VIII.

Please state whether the representative of the United States Department of Labor advised the defendant, with reference to each of the investigations listed in Interrogatories I through VI, that violations of the overtime provisions of said Act had been found.

IX.

If representatives of the said defendant were so advised, please state the nature of the violations called to their attention.

X.

(a) Please state the categories of work bid on or performed by the defendant, such as highway work, railroad work, power line work, water system work or dam or levy work since 1946.

166 (b) Please state whether defendant intends in the future to continue to bid on and perform in such categories.

STUART RATHMAN
STUART ROTHMAN, *Solicitor*

EARL STREET
EARL STREET, *Regional Attorney*

HARRY CAMPBELL, JR.
HARRY CAMPBELL, JR., *Assistant Regional Attorney*

UNITED STATES DEPARTMENT OF LABOR

Certificate of Service

(Omitted in printing.)

(File endorsement omitted)

169 IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

CIVIL ACTION No. 1645

(Title omitted)

Answers to Interrogatories—Filed October 25, 1957

Comes now H. B. ZACHRY COMPANY, Defendant in the above styled action, by and through its duly authorized attorneys, and answers the written Interrogatories propounded to it by Plaintiff on or about October 11, 1957.

I.

Answer to Written Interrogatory No. 1.

In February, 1941, a representative of the United States Department of Labor was permitted to examine Defendant's payroll records covering the period from June 1, 1940, to December 31, 1940, during which period Defendant performed for the Highway Department of the State of Texas certain highway contruction contracts. After said examination, such representative told A. Cavazos and H. B. Zachry, officers of the defendant corporation, that some of Defendant's employees were covered by the Fair Labor Standards Act and that Defendant was not complying with the Act in that some of said employees were not being paid overtime in accordance with said Act. Defendant did not agree that it was in violation of any of the provisions of the Fair Labor Standards Act, but agreed to and did exercise caution to avoid any infraction of the Fair Labor Standards Act in its operations.

II.

Answer to Written Interrogatory No. II.

In November, 1943, a representative of the United States Department of Labor was permitted to examine Defendant's payroll records covering the period from January 1, 1941, to November 7, 1943, during which period De-
170 fendant performed numerous contracts, including contracts and airfield contracts. After said examination, such representative told A. Cavazos and W. D. Tiner, then officers of defendant corporation, that some of its employees were covered by the Fair Labor Standards Act and that Defendant was not complying with the Act in that some of said employees were not being paid overtime in accordance with said Act. Defendant did not agree that it was in violation of any of the provisions of the Fair Labor Standards Act, but agreed to and did exercise caution to avoid any infraction of the Fair Labor Standards Act in its operations.

III.

Answer to Written Interrogatory No. III.

In December, 1945, a representative of the United States Department of Labor was permitted to examine Defendant's payroll records covering the period November 7, 1943, to December 31, 1945, during which period Defendant performed numerous contracts, including railroads, highways, and quarry operations from which gravel was produced, some of which gravel so produced was used in the performance of some of said contracts. After said examination, such representative told A. Cavazos that Defendant's sand and gravel operations were covered by the Fair Labor Standards Act and that Defendant was not complying with said Act. Defendant did not agree that such operations were covered by said Act, nor did Defendant believe then nor now that it was in violation of any of the provisions of said Act according to the then current decision of the Supreme Court on the subject, McLeod vs. Threlkeld, et al., 319 U.S. 491, 63 S. Ct. 1248, but did agree to operate said sand and gravel plant as though all such operations were covered by the Act from and after January 1, 1946.

IV.

Answer to Written Interrogatory No. IV.

In October, 1950, and October, 1951, representatives of the United States Department of Labor were permitted to examine the payroll records of Defendant covering
171 the period of October 22, 1948, to October 18, 1951, during which period Defendant performed various and sundry types of construction contracts, including the construction of electric power lines. After these examinations said representatives told A. Cavazos that the office manager on said power line construction contract regularly worked in excess of 40 hours per week and that he was paid a regular salary without additional compensation for overtime. Defendant, without admitting liability and without agreeing that said office manager was covered by the Fair Labor Standards Act, at the request of such representative, paid said office manager the sum of $241.50. Defendant at such time was exercising and continued to

exercise caution to avoid any infraction of the Fair Labor Standards Act in its operations.

V.

Answer to Written Interrogatory No. V.

In August, 1955, a representative of the United States Department of Labor was permitted to examine Defendant's payroll records covering the period from February 5, 1955, to August 7, 1955, during which period Defendant was engaged in the performance of a construction contract for the Gulf, Colorado and Sante Fe Railway Company between Sanger, Texas, and Dallas, Texas, employing some 250 men; and after examination, such representative told Al Downey, project superintendent, and later E. M. Hammond, personnel director of defendant corporation, that certain mechanics employed on said job were covered by the Fair Labor Standards Act and that said employees were not being paid overtime in accordance with the Act. Whereupon, Defendant made restitution to the mechanics involved, pointing out that the error of paying the mechanics a weekly salary instead of an hourly rate for hours worked was made in the field.

VI.

Answer to Written Interrogatory No. VI.

In March of 1957, a representative of the United States Department of Labor was permitted to examine the
172 payroll records of Defendant covering the period October 28, 1956, to April 6, 1957, during which period Defendant was performing a pipeline construction contract for Texas Eastern Transmission Corporation covering the construction of a pipeline from a point at the Mexican border near McAllen, Texas, to a point at Texas State Highway No. 35 near Angleton, in Brazoria County, Texas, employing some 675 men. Defendant was informed that 13 employees on said pipeline construction job were not being paid overtime in accordance with the Fair Labor Standards Act. This was brought to the attention of A. Cavazos and Chester H. Johnson, whereupon, restitution was made to such employees. This is another example of

errors being made in the field without the knowledge or consent of the officers of defendant corporation, since it was and is the intention of Defendant to pay said employees according to the Act whether covered thereby or not.

VII.

Answer to Written Interrogatories Nos. VII, VIII and IX.

The answers to these interrogatories appear in each of the answers hereinabove.

VIII.

Answer to Written Interrogatory No. X.

(a) Defendant is engaged generally in the construction business and since the year 1946, has bid on and had awarded to it various types of construction contracts, including highways, railroads, power lines, and water systems.

(b) Defendant intends in the future to continue to bid on and perform such contracts as are awarded to it.

CHESTER H. JOHNSON
Chester H. Johnson

SIDNEY CALLENDER
Sidney Callender

JOHNSON, HITE & CALLENDER
1109 Transit Tower
San Antonio, Texas

ALLEN WOOD
Allen Wood

FISCHER, WOOD, BURNEY & NESBITT
1903 Driscoll Building
Corpus Christi, Texas
Attorneys for Defendant

173 *Duly sworn to by Chester H. Johnson*

(Jurat omitted in printing)

Proof of Service

(Omitted in printing)

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176 **Minute Entry of Argument and Submission—November 11, 1958**

(Omitted in printing)

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177 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17311

H. B. ZACHRY COMPANY, *Appellant-Appellee,*

versus

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor, *Appellee-Appellant.*

(And Reverse Title)

Appeals from the United States District Court for the Southern District of Texas

Before TUTTLE, JONES and WISDOM, Circuit Judges

Opinion—January 5, 1959

TUTTLE, Circuit Judge: H. B. Zachry Company is a Texas corporation engaged in large construction projects. During its existence it has completed more than 1200 of a value of over $300,000,000. More than $78,000,000 worth of construction work was completed by this company during the three years preceding the trial. These projects include the building of highways, railroads, power lines, dams, and water systems. It was under contract with the Lower Nueces Water Supply District to build
178 a dam for the purpose of providing a water reservoir approximately ten times the size of that previously existing. The District was under contract to furnish

water exclusively for the City of Corpus Christi, Texas. The dam, known as the Mathis Dam, is some 1500 feet downriver from an older dam which would be inundated upon the completion of the new construction.

Industries in and around Corpus Christi used large quantities of water from the present water system and reservoir and will continue to do so as a necessary part of their activities in producing goods for commerce.

Investigation by the Wage and Hour Division of the Department of Labor disclosed, without dispute, that certain construction employees of Zachry Company were not paid in accordance with the minimum wage requirements of the law—that is they were not paid time and a half for overtime beyond forty hours per week, unless the overtime hours occurred on days on which the employees worked more than eight hours, or unless they worked on Sunday. Following this investigation, the Secretary filed suit against Zachry seeking a temporary and permanent injunction against such alleged violation of the Wage and Hour law.

The trial court held a hearing on the motion for preliminary injunction, and although expressing the tentative view that the activities of the construction workers were covered by the Act, it declined to enter a temporary injunction pending at full development of the case on final trial. At the later trial the Court adhered to its
179 view that the workers were covered by the Act, and granted an injunction as to the construction employees on the particular project only, stating when it did so that Zachry's president had estimated the project would be finished in thirty days. It elsewhere appeared in the record that the job was substantially completed.

Zachry Company appealed on the ground that the construction workers on this project were not covered by the applicable section of the Wage and Hour Law.[1]

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[1] 29 U.S.C.A. 207(a) provides as follows:

"Except as otherwise provided in this section, no employer shall employ any of his employees who engaged in commerce, or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours

The Secretary of Labor filed a cross appeal contending that the trial court erred in not granting a general injunction against Zachry prohibiting violation of the terms of the Act as to all future activities of the company.

The Secretary concedes that the construction workers were not engaged "in commerce." If, therefore, his views are to prevail it must be on the basis of their being engaged "in the production of goods for commerce." Since obviously they are not actually, while building the
180 dam, producing any goods for commerce, the Secretary's case must depend upon a construction of the definition section of the statute, 203(j), to the effect that the construction workers are employed "in [a] closely related process or occupation directly essential to the production" of goods.

Although this is a much litigated field, we find no decision of the Supreme Court, and only one Circuit Court opinion in which this definition is sought to be applied to a state of facts closely similar to those here presented.[2] There are certain general pronouncements of the Supreme Court, however, which serve as guide posts to us in our attempt to apply this statute. The first of these is that this statute should be given a liberal construction, *Mitchell* v. *Vollmer,* 349 U.S. 427, 429. The second is that the scope of the Act is not co-extensive with the power of Congress over commerce. *Kirchbaum* v. *Walling,* 316

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above specified at a rate not less than one and one-half times the regular rate at which he is employed."

29 U.S.C.A. 203(j) reads:

"'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purpose of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State."

2 It is to be noted that this definition was changed by an amendment to the statute in 1949. Prior to that amendment the relevant par of the definition was that an employee should be deemed engaged in the production of goods if such employee was employed "in [a] process or occupation necessary to the production" of goods.

U.S. 517. As stated in *10 East 40th Street Building, Inc.* v. *Callus*, 325 U.S. 578, "in enacting this statute Congress did not see fit, as it did in other regulatory measures, e.g. the Interstate Commerce Act and the National Labor Relations Act, to exhaust its constitutional power over commerce." A further general principle is that which requires courts to undertake, if possible, to understand the purpose sought by Congress in adopting an amendment to a statute which has already been the subject of much judicial construction.

181 As to the first general principle above enunciated, we do not understand the Government to contend that the doctrine of liberal construction overrides the court's duty to construe the language of the statute as applied to a particular state of facts in the manner which the court concludes carries out the intent of Congress. We think that this Court has consistently followed the rule of liberal construction. Recent decisions of this Court, we think, evidence its purpose to apply the language of the statute liberally in areas of doubt. In discharging what the Supreme Court in *10 East 40th Street Building, Inc.* v. *Callus, supra,* calls its "responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industry situations," this Court has held subject to the Act, because engaged in commerce, employees of a contractor engaged in building a new building for a radio broadcasting station, *Mitchell* v. *Hodges Contracting Co.*, 238 F. 2d 380, employees engaged in the construction of a field plant for production of materials essential to the construction of a causeway to become a link in an interstate highway system, *Archer* v. *Brown & Root, Inc.*, 241 F. 2d 663, and employees engaged in the construction of bulk jet fuel storage tanks and fueling systems at an airport for the United States Air Force, *Mitchell* v. *Empire Gas Engineering Co.*, 256 F. 2d 781, in which this Court stated "the Act is to be given a liberal construction. Whether an employee is engaged 'in commerce' within the meaning of the Act is determined by practical considerations, not by technical conceptions."

182 Regarding the second general principle, we think it plain both from the legislative history and the many

court decisions emphasizing the fact, that not every activity that in any way affects commerce, and not every activity that in some way leads ultimately to the production of goods for commerce, is intended to be included within the terms of the statute. The law as it stood before the 1949 amendment was itself somewhat restricted, in that an employee, to come within the act, must be employed in a process *necessary* to the production of goods to have a covered status. As stated by the Supreme Court in 10 East 40th Street Building, Inc., *supra:*

> "The series of cases in which we have had to decide when employees are engaged in an 'occupation necessary to the production' of goods for commerce has settled at least some matters. Merely because an occupation involves a function not indispensable to the production of goods, in the sense that it can be done without, does not exclude it from the scope of the Fair Labor Standards Act. Conversely, merely because an occupation is indispensable, in the sense of being included in the long chain of causation which brings about so complicated a result as finished goods, does not bring it within the scope of the Fair Labor Standards Act. See Walling v. Jacksonville Paper Co., 317 U.S. 564; Walton v. Southern Package Corp., 320 U.S. 540; Armour & Co. v. Wantock, 323 U.S. 126; Skidmore v. Swift & Co., 323 U.S. 134. In giving a fair application to § 3(j), courts must remember that the 'necessary' in the phrase 'necessary to the production' of goods for commerce 'is colored by the context not
> 183 only of the terms of this legislation but of its implications in the relation between state and national authority'. Kirschbaum Co. v. Wallings, supra, at 525. For as was pointed out in Walling v. Jacksonville Paper Co., supra, at 570, we cannot 'be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protion of the states.' We must be alert, therefore, not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation."

In connection with this language it must be further recognized that the amendment of 1949 made even more restrictive the definition of production of goods for commerce by changing the word "necessary" to the term "directly essential," and by adding also the words "closely related" to modify the word "occupation." Reference need not be made to Committee reports or other aids by way of legislative history for the court to draw the conclusion that the intent of Congress in the enactment of such amendments was to add to rather than detract from the class of employees to be considered engaged in local enterprises.

Obviously, an occupation might be necessary to the production of goods for commerce which is not closely related to production, and which even if closely related is not directly essential to production. Undoubtedly the employees who haul concrete to the dam site; those who clear the site; those who build the frames for the work and who actually pour the concrete or grade the earthen dam, are links in the "long chain of causation which brings about so complicated a result as finished goods."

184 The courts have consistently held, however, that those engaged in building a plant to be used for the manufacturing of goods do not even come within the more liberal requirement of the old statutory definition of "necessary to the production of goods." *McDaniel* v. *Brown & Root*, 10 Cir., 172 F. 2d 466. As noted in footnote 4, page 471, of the opinion in that case by the Court of Appeals for the Tenth Circuit:

> "The view that employees engaged in the original construction of buildings or facilities are not within the coverage of the Fair Labor Standards Act, even if the building or facility, when completed, will be used to produce goods for commerce, is supported, we think, by the action of the Supreme Court in Murphy v. M. T. Reed, et al, 335 U.S. 865, S.Ct. 105. In that case the Court of Appeals for the Fifth Circuit, 168 F. 2d 257, had held that employees of a contractor under a cost-plus-a-fixed-fee contract for the original construction of a Navy camp for training construction battalions (Sea Bees) and a Naval Ad-

vance Depot at Gulfport, Mississippi, were not within the coverage of the Fair Labor Standards Act of 1938, and that certain other employees, performing work under a cost-plus-a-fixed-fee contract for the maintenance and operation of such facilities, were likewise not within the coverage of such Act, and reversed a decision of the District Court holding that both groups of employees were within the coverage of such Act. The Supreme Court granted certiorari and directed that the judgments below be vacated and the case remanded to the District Court with instructions to dismiss those causes of action involving solely
185 construction work and to reconsider the remaining causes of action in the light of the decisions in the case of Kennedy v. Silas Mason Co., 334 U.S. 249, 68 S. Ct. 1031."

We think this analysis of the Murphy case is correct and that there is thus Supreme Court approval of the many cases of similar import from the Courts of Appeals. See *Reed* v. *Murphy*, 5 Cir., 168 F. 2d 257, affirmed as to construction workers in *Murphy* v. *M. T. Reed, et al., supra; Parham* v. *Austin*, 5 Cir., 158 F. 2d 566; *Noonan* v. *Fruco Construction Co.*, 8 Cir., 140 F. 2d 633; *Kelly* v. *Ford, Bacon & Davis*, 3 Cir., 162 F. 2d 555. These cases recognize that the rule they apply is in accord with the Interpretative Bulletin No. 5 of the Wage and Hour Division itself[3] expressing the view that employees engaged in the original construction of buildings ultimately used for production of goods for commerce are not within the scope of the Act. These cases all arose under the earlier definition. Certainly no broader coverage has been intended by the amendment of 1949. Moreover, the construction

[3] Wage and Hour Interpretative Bulletin No. 5, Paragraph 12, Dec. 2, 1938, revised Nov. 1939, reads: "The question arises whether the employees of builders and contractors are entitled to the benefits of the Act. The employees of local construction contractors generally are not engaged in interstate commerce and do not produce any goods which are shipped or sold across state lines. Thus, it is our opinion that employees engaged in the original construction of buildings are not generally within the scope of the Act, even if the buildings when completed will be used to produce goods for commerce. . . ."

workers here are at least one more step physically removed from production than are workers building facilities which are to be used for manufacturing or assembling for commerce. Here the end product of the construction
186 work is the dam or, at most, the reservoir. These facilities then impound or contain water, which is then used in the manufacture of goods for commerce. As said in *10 East 40th St.* v. *Callus, supra:* "Remoteness of a particular occupation from the physical processes (of production) is a relevant factor in drawing the line."

Cases which apply the "engaged in commerce" provision of the Act are of course not applicable here. Thus we can derive little guidance in construing the definition section relating to production of goods for commerce from *Allstate Construction Co.* v. *Durkin*, 345 U.S. 13, and *Mitchell* v. *Vollmer*, 349 U.S. 427.

The Court of Appeals for the Tenth Circuit and the Court in the Eighth Circuit in the two Chambers Construction Company cases, *Mitchell* v. *Chambers Construction Co.*, 10 Cir., 214 F. 2d 515, and *Chambers Construction Co.* v. *Mitchell*, 8 Cir., 233 F. 2d 717 expressed the view that construction workers engaged in repairing and enlarging a city's water supply were not engaged in original construction and that the definition of production of goods was broad enough to cover them. The first case did not need to, and did not, decide the issue, because it affirmed the lower court's refusal to grant an injunction, even though the court said "we are inclined to agree" with the Secretary's contentions. In the second case the Court equated the new construction concept as to instrumentalities of commerce, *Vollmer* v. *Mitchell, supra*, with construction of facilities to be used for production of goods. With all deference to the court, it is clear that
187 it did not support its conclusion by an analysis of the cases clearly recognizing the distinction between these two bases for coverage.

Applying, as we must, the declared intent of Congress to require a showing of something more clearly related to production and something more directly essential to production than had obtained under the earlier law, we cannot consistently hold that this construction work was a covered occupation because one closely related and directly

essential to the production of goods for commerce. This would not only amount to a reversal of our earlier decisions, but would also amount to narrowing the class of excepted occupations in the face of a Congressional mandate to broaden it.

We conclude that the record discloses that the occupations here involved were not covered under the Act.

The judgment is REVERSED for entry of judgment for appellant.

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188 IN UNITED STATES COURT OF APPEALS

No. 17311

H. B. ZACHRY COMPANY,

versus

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,

(And Reverse Title)

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

Judgment—January 5, 1959

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed for entry of judgment for appellant, H. B. Zachry Company, in accordance with the opinion of this Court.

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189 Clerk's Certificate to foregoing transcript omitted in printing

No. , October Term, 1958

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor, *Petitioner*,

vs.

H. B. ZACHRY COMPANY

Order Extending Time to File Petition for Writ of Certiorari—March 26, 1959

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 1, 1959

HUGO L. BLACK
Hugo L. Black
Associate Justice of the Supreme Court of the United States.

Dated this 26th
day of March, 1959

No. 83, October Term, 1959

(Title omitted)

Order Allowing Certiorari—October 12, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆U S GOVERNMENT PRINTING OFFICE 1959—531720/P D 899